DOCUMENT RESUME

ED 339 264 HE 024 382

TITLE	Hearing on the Department of Education, Office of Civil Rights Policy on Student Financial Assistance. Hearing before the Committee on Education and Labor. House of Representatives, One Hundred First Congress, Second Session.
INSTITUTION	Congress of the U.S., Washington, D.C. House Committee on Education and Labor.
PUB DATE	19 Dec 91
NOTE	453p.; Serial No. 101-132.
AVAILABLE FROM	Superintendent of Documents, Congressional Sales Office, U.S. Government Printing Office, Washington, D.C. 20402. Not available from ERIC in paper copy due to marginal legibility.
PUB TYPE	Legal/Legislative/Regulatory Materials (090)
EDRS PRICE	MF01/PC19 Plus Postage.
DESCRIPTORS	*Civil Rights Legislation; *Educational Policy; *Federal Aid; Football; Hearings; Higher Education; Minority Groups; *Racial Discrimination; *Scholarship Funds; *Student Financial Aid
IDENTIFIERS	Congress 101st; Department of Education; *Fiesta Bowl; Office of Civil Rights Guidelines

ABSTRACT

This transcript of a hearing addresses the Department of Education, Office of Civil Rights (OCR) policy pertaining to racially based school scholarships, in particular, an offer by OCR, announced the previous week, to review for Fiesta Bowl officials plans for a scholarship program named for Martin Luther King Jr. and a recently announced Department of Education policy statement on race-exclusive scholarships. Fiesta Bowl officials had announced scholarship contributions of $100,000 to each of the schools fielding a team in the annual college football game. OCR has interpreted the law to prohibit race-exclusive scholarships such as those which had been proposed by Fiesta Bowl officials because regulations prohibit recipients of Department of Education funds from denying, restricting, or providing different or segregated financial aid or other program benefits on the basis of race, color or national origin. After a brief opening statement by Committee Chairman Augustus F. Hawkins, witnesses testified representing such institutions as: American Council on Education, National Association of Independent Colleges and Universities, the United Negro College Fund, National Association for Equal Opportunity in Higher Education, United States Student Association, National Council of Persons. Included are prepared statements of the witnesses, correspondence relating to the OCR Fiesta Bowl announcement and the hearing, and the prepared statements of a few witnesses who did not testify in person. An extensive appendix includes a chronology of OCR documents relating to race-exclusive scholarships; and 29 newspaper, journal and magazine articles. (JDD)

HE

HEARING ON THE DEPARTMENT OF EDUCATION, OFFICE OF CIVIL RIGHTS POLICY ON STUDENT FINANCIAL ASSISTANCE

ED 339 264

HEARING

BEFORE THE

COMMITTEE ON EDUCATION AND LABOR HOUSE OF REPRESENTATIVES

ONE HUNDRED FIRST CONGRESS

SECOND SESSION

HEARING HELD IN WASHINGTON, DC, DECEMBER 19, 1990

Serial No. 101-132

Printed for the use of the Committee on Education and Labor

HE 024 382

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HEARING ON THE DEPARTMENT OF EDUCATION, OFFICE OF CIVIL RIGHTS POLICY ON STUDENT FINANCIAL ASSISTANCE

WEDNESDAY, DECEMBER 19, 1990

House of Representatives,
Committee on Education and Labor,
Washington, DC.

The committee met, pursuant to call, at 1:00 p.m., in Room 2175, Rayburn House Office Building, Hon. Augustus F. Hawkins [Chairman] presiding.

Members present: Representatives Hawkins, Clay, Hayes, Mfume, Coleman, Petri, Gunderson, and Smith.

Staff present: Reginald C. Govan, counsel; Jack jennings, counsel; Gale Baron Black, associate counsel; Beth Buehlmann, education coordinator; Jo-Marie St. Martin, education counsel; Dottie Strunk, labor coordinator; and Randy Johnson, labor counsel.

Chairman **Hawkins**. The Committee on Education and Labor is called to order. The hearing today is to provide an opportunity for the Department of Education to explain its recently announced policy pertaining to racially based school scholarships and for the affected groups to testify pertaining thereto.

I believe this will be the last hearing of the committee this Congress. We thought three weeks ago that we were in the last one but apparently things change. I am confident that this is the last one. With that in mind, we invited Mr. Michael Williams, Assistant Secretary for Civil Rights, to testify. I personally issued this invitation some days ago. I thought he had made a committment. Is Mr. Williams present? Is anyone representing the department ready to testify?

When we scheduled this hearing, we were assured that Mr. Williams would be available.

On Monday, December 17, I received written confirmation of his appearance from Ms. Nancy Kennedy who in part said, on behalf of the department, "I am pleased to inform you that Michael Williams, Assistant Secretary for Civil Rights, will testify at the hearing." Without objection, these letters will be printed in the record at this point.

[The information follows:]

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF LEGISLATION AND CONGRESSIONAL AFFAIRS

monday

December 17, 1990

Hon. Augustus F. Hawkins
Chairman,
House Committee on Education and Labor
Washington, D.C. 20515

Dear Mr. Chairman,

Thank you for the invitation for the Department of Education to testify at the hearing to be held on Wednesday December 19, 1990 at 1:00 p.m. in room 2175 of the Rayburn House Office Building.

On behalf of the Department, I am pleased to inform you that Michael Williams, Assistant Secretary for Civil Rights will testify at the hearing.

I am confident that the hearing will provide an opportunity for a thorough and complete discussion of the issues.

Sincerely,

Nancy Mohr Kennedy

Nancy Mohr Kennedy
Assistant Secretary for Legislation
and Congressional Affairs

400 MARYLAND AVE., S.W. WASHINGTON, D.C. 20202-3100

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December 13, 1990

Mr. Michael Williams
Assistant Secretary for Civil Rights
Department of Education
400 Maryland Avenue, S. W.
Washington, D. C. 20202

Dear Mr. Williams,

I wish to extend a personal invitation to you to attend a meeting of the full committee of the House Committee on Education and Labor, Wednesday December 19, 1990 at 1:00 p.m., in 2175 of the Rayburn House Office Building.

The meeting is in reference to an Order pertaining to student aid and compliance with Title VI and a letter dated December 4, 1990 from you to Mr. John Junker regarding the Fiesta Bowl.

I appreciate you taking time out of your busy schedule to attend this meeting and I look forward to your participation.

Sincerely,

Gus Hawkins

Augustus F. Hawkins
Chairman

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Chairman **Hawkins**. Actually the Chair had prepared two statements to introduce the hearing today, one based on Mr. Williams' appearance, which I changed to make a little stronger after learning last evening that neither Mr. Williams nor anyone else would be representing the department. I have never attempted to be overly aggressive or too emotionally involved in an issue on this committee.

I try to maintain at least some semblance of objectivity, which may be controversial to some. But the department's decision not to offer a witness today is an affront to the committee, to the Congress, and to the American people.

I won't read aloud my prepared statement which is a little stronger than the Chair usually issues on these matters. But, the policies and misguided efforts to turn back the clock of equality are very apparent in this instance.

A few weeks ago I talked to a friend of mine who was going overseas to the Middle East. I had a chance to discuss with him his assignment. Let's just refer to him as "GI Joe." He was headed overseas. I questioned him about his concerns for himself and his family. I was somewhat surprised that he didn't seem worried about what he was to face overseas. He was not worried about the weather, the enemy or even the possibility of not coming back. What he was worried about was what would or what might happen to his family while he was over there.

Among the things he expressed great concern about were his three children, whether they would be educated and eventually he hoped they would be able to get a college education. Well, I commended him and assured him that you do what you have to do and God bless you, and some of us will try to take care of things on the home front.

The hearing today is one attempt to take care of a few things on the home front. I regret that there are some in the Bush Administration who apparently don't want to do that.

The Chair would like to yield to any of the other members who would like to make a brief statement at this time.

[The prepared statement of Hon. Augustus F. Hawkins follows:]

Honorable Augustus F. Hawkins
OPENING STATEMENT
OVERSIGHT HEARING ON THE DEPARTMENT OF EDUCATION,
OFFICE OF CIVIL RIGHTS POLICY ON
STUDENT FINANCIAL ASSISTANCE
1:00 p.m.
Wednesday, December 19, 1990

REGRETTABLY, LATE YESTERDAY THE DEPARTMENT OF EDUCATION CANCELLED ASSISTANT SECRETARY WILLIAMS PREVIOUSLY AGREED TO APPEARANCE. THAT DECISION IS AN AFFRONT TO THE COMMITTEE, TO THE CONGRESS AND TO THE AMERICAN PEOPLE.

LURCHING FROM POLICY BY PRESS RELEASE TO POLICY BY PRESS CONFERENCE, THE DEPARTMENT OF EDUCATION AND, INDEED, THE ADMINISTRATION ITSELF HAS DEMONSTRATED A DISDAIN FOR THE ORDERLY PROCESS OF GOVERNMENT.

THIS FIRST HEARING IS TO EXAMINE YET ANOTHER OF THE ADMINISTRATION'S POLICIES AND MISGUIDED EFFORTS TO TURN BACK THE CLOCK ON EQUALITY. LAST WEEK, SOME IN THE ADMINISTRATION ANNOUNCED AND YESTERDAY CONTINUED THEIR ABRUPT AND UNWARRANTED ABANDONMENT OF DECADES OF FEDERAL POLICY TO PROVIDE HIGHER EDUCATIONAL OPPORTUNITY TO MINORITY SCHOOL CHILDREN. BOTH DECISIONS REVERSE LONG-STANDING FEDERAL POLICIES. NEITHER DECISION WAS TAKEN AFTER CONSULTATION WITH COLLEGES, UNIVERSITIES, BUSINESS LEADERS, STATE GOVERNMENTS OR PRIVATE ORGANIZATIONS THAT FUND AND ADMINISTER FINANCIAL AID PROGRAMS.

BOTH DECISIONS ARE FATALLY FLAWED BECAUSE THEY FAIL TO TAKE ACCOUNT OF THE VARIETY OF SCHOLARSHIP PROGRAMS DEVELOPED IN EXPLICIT RELIANCE FOR THEIR LEGALITY ON LONG-STANDING FEDERAL POLICY. UNDER THAT LONG-STANDING POLICY, MINORITY-RESTRICTED SCHOLARSHIP PROGRAMS WERE PERMISSIBLE WHERE ADMISSIONS AND FINANCIAL AID DECISIONS WERE MADE SEPARATELY, AND WHERE SUCH PROGRAMS DID NOT PRODUCE A RACIAL IMBALANCE IN A SCHOOL'S OVERALL FINANCIAL AID ALLOCATIONS. THAT POLICY WAS BOTH LEGALLY AND PRACTICALLY APPROPRIATE AND FULLY CONSISTENT WITH TITLE VI OF THE CIVIL RIGHTS ACT OF 1964.

THE LATEST POLICY ANNOUNCED YESTERDAY IS A HOAX. IT DISAPPROVES SCHOLARSHIPS ESTABLISHED AND FUNDED BY COLLEGES, BUT APPROVES THOSE ESTABLISHED AND FUNDED BY PRIVATE PERSONS. SUCH A DISTINCTION HAS NO BASIS IN LAW OR FACT; MOREOVER, IT IS CONTRARY TO THE EXPRESS LETTER OF THE CIVIL RIGHTS RESTORATION ACT -- ENACTED OVER THE VETO OF THE REGAN-BUSH ADMINISTRATION. ACCORDINGLY, THE LATEST POLICY IS INDEFENSIBLE AND SERVES MERELY AS AN INVITATION TO YEARS OF LITIGATION. SUCH UNCERTAINTY AND INSTABILITY IS NEITHER WISE NOR NECESSARY.

THE PAST WEEK DRAMATICALLY ILLUSTRATES AN ADMINISTRATION EMPTY OF NEW IDEAS ENTHUSIASTICALLY EMBRACING ONE VERY OLD IDEA--LASHING OUT AT THE POOR, THE VULNERABLE, AND THE MINORITY AMONG US.

THERE ARE MANY DISTINGUISHED WITNESSES TODAY, AND I LOOK FORWARD TO THEIR TESTIMONY.

UNITED STATES
DEPARTMENT OF EDUCATION NEWS
FOR RELEASE
December 4, 1990
Contact: Rodger Murphey
(202) 401-0774

FIESTA BOWL OFFICIALS ADVISED OF CIVIL RIGHTS OBLIGATIONS

The U.S. Education Department Office for Civil Rights (OCR) today offered to review for Fiesta Bowl officials any plans for a scholarship program named for Martin Luther King Jr. The offer was prompted by OCR concern that a proposed scholarship may inadvertently violate civil rights provisions governing participating insititutions.

"I commend your efforts at advancing minority opportunities in education," Michael L. Williams, assistant secretary for civil rights, said in a letter to the executive director of the Fiesta Bowl, Tempe, Ariz. "However, you should be aware of certain civil rights obligations of the participating universities under Title VI of the Civil Rights Act of 1964..."

Williams cited regulations [34 C.F.R. 100.3 (b)] that prohibit recipients of Department funds from denying, restricting, or providing different or segregated financial aid or other program benefits on the basis of race, color or national origin. OCR has interpreted the law to prohibit, in most cases, race-exclusive scholarships.

Fiesta Bowl officials have announced contributions of $100,000 to each of the schools fielding a team in the annual college football game. The funds would then be used to award scholarships to minority applicants. The University of Louisville Cardinals will play The University of Alabama Crimson Tide on New Year's Day.

-MORE-

In his letter to the executive director of the Fiesta Bowl, Williams suggested, "Alternatively, the University may wish to consider changing the Martin Luther King Jr. scholarship fund from a race-exclusive program to a program in which race is considered a positive factor among similarly qualified individuals, or to a program that utilizes race-neutral criteria."

Examples of such criteria include scholarships limited to students who are economically disadvantaged, educationally disadvantaged or from single-parent families.

In his letter, Williams said the prohibitions under the Title VI statute apply to recipient universities, not to the Fiesta Bowl. "The Fiesta Bowl can, therefore, award race-exclusive scholarships directed to students. However, the universities that those students attend may not directly, or through contractual arrangements, assist the Fiesta Bowl in the award of those scholarships through solicitation, listing, approval, provision of facilities, or other services."

Violations of Title VI of the Civil Rights Act place schools at risk of losing all federal funding, including the ability of their students to participate in the federal student grant programs.

###

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS
THE ASSISTANT SECRETARY

DEC 4 1990

Mr. John Junker
Executive Director
c/o Fiesta Bowl
120 South Ash Avenue
Tempe, Arizona 85281

Dear Mr. Junker:

Recent news reports have indicated that the Fiesta Bowl intends to contribute $100,000 to each of this year's participants to create a Martin Luther King Jr. scholarship fund for minority students. I commend your efforts at advancing minority opportunities in education. However, you should be aware of certain civil rights obligations of these participating universities under Title VI of the Civil Rights Act of 1964, which is enforced by the Office for Civil Rights (OCR).

Title VI prohibits discrimination on the ground of race, color, or national origin in any program or activity receiving Federal financial assistance. OCR enforces this statute and the Title VI regulation of the Department of Education (ED) with respect to recipients of Federal education funds. The Title VI regulation includes several provisions that prohibit recipients of ED funding from denying, restricting, or providing different or segregated financial aid or other program benefits on the basis of race, color, or national origin. 34 CFR §§ 100.3(b)(1)-(5) (1989). OCR interprets these provisions as generally prohibiting race-exclusive scholarships. However, a recipient may adopt or participate in a race-exclusive financial aid program when mandated to do so by a court or administrative order, corrective action plan, or settlement agreement. See 34 CFR § 100.3(b)(6).

While these prohibitions apply to recipient universities, the Title VI statute and regulation do not apply to the Fiesta Bowl. Assuming that the Fiesta Bowl is a strictly private entity that receives no Federal financial assistance, it can award race-exclusive scholarships directly to students. However, the universities that those students attend may not directly, or through contractual or other arrangements, assist the Fiesta Bowl in the award of those scholarships unless they are subject to a desegregation plan that mandates such scholarships. Examples of such university assistance would include soliciting, listing, approving, or providing facilities or other services in connection with a race-exclusive financial aid program.

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Consequently, assuming that participants in the Fiesta Bowl are recipients of Federal education funds, they could permit the sponsors of the Fiesta Bowl to provide their students with race-exclusive scholarships or other financial aid, but could not receive or disperse such scholarship funds or otherwise assist the Fiesta Bowl sponsors unless subject to a desegregation plan that includes such scholarships.

Alternatively, you may wish to consider changing the Martin Luther King Jr. scholarship fund from a race-exclusive program to 1) a program in which race is considered a positive factor amongst similarly qualified individuals if the institution is one where there has been limited participation of a particular race See 34 CFR § 100.3(b)(6)(ii), or 2) a program that utilizes race-neutral criteria. For example, eligibility to participate in a race-neutral scholarship program could be limited to students who are disadvantaged because of economic status (students from low-income families), educational status (students from poor school districts), or social status (students from single-parent families, or families in which few or no members ever attended a postsecondary institution).

Jeannette J. Lim, a senior attorney on my staff, will contact you in the near future to provide you assistance in designing and implementing the Martin Luther King Jr. scholarship program in a manner which will accomplish the goals you wish to achieve. If you wish, you may contact her at (202) 732-1645.

Sincerely,

Michael L. Williams
Assistant Secretary
for Civil Rights

cc: Lillian Gutierrez, Regional Civil Rights Director, Region VIII

UNITED STATES
DEPARTMENT OF EDUCATION NEWS

FOR RELEASE
December 18, 1990

Contact: John Bertak
(202) 401-1576

DEPARTMENT ISSUES POLICY STATEMENT ON RACE-EXCLUSIVE SCHOLARSHIPS

The U.S. Department of Education today announced a six-point administrative policy regarding race-exclusive scholarships to prevent disruption to the efforts of colleges and universities to attract minorities to their campuses and to reassure students that no scholarships that have already been awarded, whether in the current year or in a multi-year cycle, will be affected in any way.

The six points are:

1. The Administration fully endorses voluntary affirmative action in higher education, and encourages educational opportunities for minority and disadvantaged students.
2. ED has decided that the Title VI regulations will be enforced in such a way as to permit universities receiving federal funds to administer scholarships established and funded entirely by private persons or entities where the donor restricts eligibility for such scholarships to minority students. Under Title VI, however, private universities receiving federal funds may not fund race-exclusive scholarships with their own funds.

-MORE-

3. Race-exclusive scholarships funded by state and local governments are covered by the Supreme Court's decisions construing the Constitution and thus cannot be addressed administratively.
4. Given the evident confusion among the universities on the preceding point, ED will provide universities a four-year transition period in order to permit universities to review their programs under Title VI, and to assure that any students under scholarship, or being evaluated for scholarship, do not suffer. ED is eager to provide technical assistance to any institution during this four-year period. Such technical assistance has already helped universities administer their scholarship programs in full compliance with Title VI.
5. During the four-year transition period, the Administration will not pursue a broad compliance review with respect to minority scholarships but will fulfill its statutory obligation to investigate any complaints received.
6. The Administration will encourage state legislatures, local governments, and private universities receiving federal funds to carefully review and analyze the legal restrictions on minority scholarship programs imposed by the courts, so that these entities may continue to the fullest extent possible to provide scholarship assistance to minorities and other persons in need.

###

Mr. **Coleman**. Thank you. We are called together here today to hear testimony that most of us anticipated hearing today. The circumstances and the issues that surround the testimony indicate a constitutional and certainly a political thicket which lawyers and those on all sides of the legal issue can probably argue meritoriously. We are faced, of course, with the long view of things here.

Quickly scheduled hearings sometimes serve as an escape valve for pressure and that is appropriate and this hearing is appropriate. These issues will stay with us into the next Congress.

We do have the responsibility of drafting the Higher Education Act in the next Congress. These issues will have to be reevaluated and hearings held in the future. So, this is not certainly the end of that process. It may well be a preliminary beginning.

I think all of us were taken somewhat by surprise, by the Administration official's interpretation of the laws and constitutional issues, such interpretations raise questions about the administration of these laws.

But I will be here today to hear the testimony of the witnesses and look forward to the discussion of some very complex issues which do affect many people in this country.

Chairman **Hawkins**. Mr. Clay.

Mr. **Clay**. Mr. Chairman I don't think too many of us were really shocked and surprised at the rulings by Mr. Williams over there at the department. I think it is indicative of a long line of examples of lack of concern about what happens to minorities in this country on the part of this Administration.

They seem to be only concerned about quotas that include and not quotas that exclude women and other minorities. Just for the record, historically the only way people who have been disadvantaged can catch up is by affirmative action and special set asides.

One of the most popular programs ever initiated and instituted in this country was the GI Bill of Rights. That was an affirmative action program that set aside certain kinds of government programs to assist those who had been disadvantaged because they went to World War II or the Korean War and were taken out of the economy for two or three years.

That is precisely what we are saying in terms of affirmative action and set asides. For 200 years, women and blacks and Hispanics have been disadvantaged because of their sex, their race or because of both.

If we don't do something positive aggressively, affirmatively to enable them to catch up, then they will never catch up. They will always be behind and always be disadvantaged. I just want to say to you, Mr. Chairman, I don't know why Mr. Bush was shocked or surprised that one of his subordinates would issue such a ridiculous ruling as that recently issued by Mr. Williams.

What does he expect after fostering the kinds of racial and sexual hostilities that he has since he has been the President of the United States.

Thank you.

Chairman **Hawkins**. Mr. Gunderson.

Mr. **Gunderson**. I have been trying to detect a blessing in disguise about the controversy over the last week. I think I found one. I think it is indeed proper that the final hearing you chair for the

Education and Labor Committee will be a hearing where this committee moves to enforce its will if not to legislate to make sure we protect the rights of all people and all minorities.

I think there is something proprietary about us being here at this time. I share your disappointment at Mr. Williams not testifying today. I was surprised as I guess most members of the committee with the Administration's original decision and was pleased with their reversal but wish they could have discussed it today.

I think Mr. Williams can ably defend himself, whether we agree or disagree. But most importantly I think there is a need for clarification. We have had one interpretation of the Civil Rights Act as it affects higher education since 1964 to present. Apparently that will now continue for four years but after the four years, "it will not." I think we need to ask questions about what that means.

It is no secret to anybody in this room, I am sure to no one at the Members' table, that I am one who would oppose the civil rights legislation coming out of this committee for a couple of reasons. But I think it is equally important that we emphasize the difference in the issue in front of us today from what many of us perceived were the mandates of that civil rights legislation.

The question today is whether or not colleges, universities, individuals and entities can voluntarily engage in actions to promote affirmatively the destinies of certain individuals within our society. If you believe in affirmative action as I believe most Americans do, I think the issue before us is probably at the very heart of how are we going to put our commitment to affirmative action into reality. If you believe that in American society we reward people based on individual initiatives but it is the role of government and in education to guarantee everyone an equal opportunity at the same starting line, then certainly recognizing the diverse histories and environments of our young people, our greatest resource, certainly these programs for equal access and opportunity seem to be justified.

I pledge to work with you, Mr. Chairman, even when you are not the chairman, to make sure we do continue progress for more than four years in this direction.

Chairman HAWKINS. Thank you. You stated well the purpose of the hearing; it is for clarification. It may be a beginning but it is an important beginning because if we delay, even a day, there are students out there who are in the process of applying for these scholarships. If they are discouraged, no matter how much or how few, if they are discouraged, then obviously this hearing, in trying to clarify the issue, will help somebody, and some program which may be in the process of accepting applications.

So I hope that the hearing today will provide some clarification. We have a list of distinguished witnesses who care about what is happening. Many potential wittnesses were turned back because we thought that we would not have the time. Apparently, we will have more time than what we had anticipated.

I indicated to Mr. Williams that we would put him on first and accommodate his schedule. We had anticipated that he would testify between 1:00 and 2:00 p.m. and probably as late as 2:30. That obviously will not take place. We will go then to the other witnesses.

To anyone who wanted to testify but was not listed on the agenda, I want to apologize. We thought we would not have enough time. I have several letters that should be entered into the record at this point. Without objection, I ask that a letter of the Council of Chief State School Officers in opposition to the attempt by the Department of Education to change regulations regarding the award of scholarships; and a statement from Mr. Donald Stewart, president of The College Board, be entered in the record.

[The information follows:]

The College Board
45 Columbus Avenue New York, New York 10023-6992
(212) 713-8000

Office of the President

WRITTEN STATEMENT

by

DR. DONALD M. STEWART

PRESIDENT, THE COLLEGE BOARD

to the

HOUSE EDUCATION AND LABOR COMMITTEE

U.S. CONGRESS

DECEMBER 19, 1990

Though the subject of this hearing has to do with civil rights legislation and recently announced regulations, I first have a message for all minority students. It is this: I know it must be difficult for you to ignore the recent headlines and press reports indicating an end to minority scholarships. Do not be discouraged. The opportunity and the funds are still there. Don't let these press reports cause you to give up your dream of higher education.

I offer that message first because through bitter experience the College Board has learned over the years that even the discussion of reducing financial aid for college-bound students creates in them the impression that financial aid has in fact been reduced. That impression in turn discourages them and they

A nonprofit educational association serving students, schools, and colleges through programs designed to expand educational opportunity

do not seek the aid they need--aid that in fact is there for them--but resign themselves to abandoning a dream. I do not want that to happen in this most recent and unfortunate controversy.

As an educator, and an African American, I take pride in the progress that has been made since I was a college student in the number of minorities going to college. It should be noted for the record that the number of black men and women attending college has increased markedly over the past decade, as has the number of Hispanic men and women. The scores of African American students on our SAT exams have increased significantly over the past 10 years, even as those of white students have remained the same. And the number of minority students taking and doing well in our Advanced Placement courses has skyrocketed.

And yet, even though significant progress has been made, much remains to be done. Over the past decade the number of black and Hispanic men and women graduating from high school has grown even more swiftly than the number going on to college. The sad news is that as a consequence, for example, the proportion of black high school graduates aged 18 to 24 going to college has leveled off. On a percentage basis, it has remained at 28 percent in the decade of the 1980s. More ominously, the American Council on Education reports that degree attainment for these groups has declined in recent years.

STATEMENT BY DR. DONALD M. STEWART TO THE
HOUSE EDUCATION AND LABOR COMMITTEE, U.S. CONGRESS
December 19, 1990

Unquestionably, one of the reasons for the success achieved with regard to minorities in higher education has been the growing availability of minority scholarships at institutions that are predominantly white. We have found that nearly 700 colleges and universities nationwide have scholarships designated for minorities. And they have them for good, self-interested reasons as well as for democratic and civic-minded ones. As Donna Shalala, chancellor of the University of Wisconsin at Madison has noted, no college or university can any longer call itself great unless its administrators, faculty, programs and students fully reflect the rich, multicultural diversity of contemporary America.

Any policy or action by the Office of Civil Rights that would end these programs would not only undo the great progress we have made in increasing the diversity of students on formerly white campuses, but it would also have a secondary consequence of discouraging potential donors from giving to higher education in general.

While I welcome the administration's endorsement of "voluntary affirmative action in higher education" expressed in the Department of Education press release yesterday, I fear that the six-point administrative policy announced then raises more questions than it answers. It certainly does little to allay the fears we have about the ultimate impact of this initiative on minority scholarships, and the message that is sent to students by any diminution of aid for them.

Most importantly, a ruling of this sort can seriously put in jeopardy the future of our great nation. As my good friend, Lou Harris, told the College Board's national forum two years ago here in Washington, "By the end of the next decade, our country will have either succeeded or failed on the pivotal issue of how to open the doors of opportunity to minority young people. If we succeed in [making]...them creative, thinking workers, as must happen with young whites, then surely we will have created a strongly competitive America that will be the envy of the world. But if we fail... that will condemn us to second tier economic status as a nation. Mark it well."

In closing let me say that I share with my colleagues in the education community and among the member colleges and universities of the College Board the shock and dismay they have expressed at the new and draconian policy announced by Assistant Secretary Williams, even in light of the efforts to clarify its meaning. It surely was not the intent of Congress, when it enacted Title VI of the Civil Rights Act of 1964, to outlaw efforts to increase the distressingly low numbers of minority students in predominantly white colleges and universities nationwide.

STATEMENT BY DR. DONALD M. STEWART TO THE
HOUSE EDUCATION AND LABOR COMMITTEE, U.S. CONGRESS
December 19, 1990

However, if this policy is allowed to stand, the clear message it will send to young minority men and women is that their higher education in predominantly white institutions is a matter of indifference to this nation. Coming after so many years of trying to persuade them that, in fact, the way is open, and that their presence is desirable and desired in the educational community, and necessary for our national social and economic wellbeing, that would be a tragic outcome indeed.

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COUNCIL OF CHIEF STATE SCHOOL OFFICERS

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Resource Center on Educational Equity 202 393-8159 State Education Assessment Center 202 624-7700

December 19, 1990

The Honorable Augustus Hawkins
Chairman
U.S. House of Representatives
Committee on Education and Labor
2181 Rayburn House Office Building
Washington, D.C. 20515

Dear Mr. Chairman:

I write to express the Council's vigorous opposition to the attempt by the Department of Education to change regulations regarding the award of scholarships to minority students. I request that this letter be made a part of the record of your hearing on this topic today.

During this past year, I have had the privilege of testifying before your Committee on behalf of our Council and our Task Force on Minority Teachers, which represents the major elementary, secondary and higher education organizations of this nation, urging the Congress and Administration to take action to increase the numbers of minority elementary and secondary education teachers. A copy of the Task Force proposal is attached. We have urged this special action because of the critical circumstance of decline in the numbers of minority teachers in our schools and the need to provide a diversity of racial and ethnic backgrounds of teachers for the benefit of all students.

We have been extraordinarily distressed these past few days over the incredibly inept actions by certain members of the Education Department and the Administration with respect to attempted revisions in regulations and policies on scholarships for minority students. At the time when it is so important in our nation to encourage minority students to undertake collegiate study and preparation for professions such as teaching, these Administration actions have resulted in confusion and negative signals which impede the efforts of states and institutions to encourage minority students with their plans for collegiate study.

President HERBERT J. GROVER, Wisconsin Superintendent of Public Instruction • **President Elect** WERNER ROGERS, Georgia Superintendent of Schools • **Vice President** ALAN MORGAN, New Mexico Superintendent of Public Instruction • **Directors** BETTY CASTOR, Florida Commissioner of Education • H. DEAN EVANS, Indiana Superintendent of Public Instruction • JERRY L. EVANS, Idaho Superintendent of Public Instruction • BILL HONIG, California Superintendent of Public Instruction • EUGENE T. PASLOV, Nevada Superintendent of Public Instruction • GERALD N. TIROZZI, Connecticut Commissioner of Education • **Executive Director** GORDON M. AMBACH

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The Honorable Augustus Hawkins
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We urge you and the members of the Committee take steps to force the Administration to take immediate and decisive steps to ensure continuing authorization for the provision of scholarships for minority students. The Administration must cease ad hoc interpretations which change essential practices.

Sincerely,

Gordon M. Ambach

GMA:djb

Attachment

TASK FORCE ON MINORITY TEACHERS

PROPOSED FEDERAL ACTION TO INCREASE THE NUMBER OF MINORITIES IN ELEMENTARY AND SECONDARY TEACHING

Statement of Need

The number of minority teachers in American elementary and secondary schools is declining, as is the proportion of minority teachers. The decline occurs at a time when the proportion of minority teachers to total teachers is significantly lower than that of the minority students to total students and a time in which the proportion of minority students, especially those at risk, is steadily increasing.

Urgent actions are needed at federal, state, and local government levels and by institutions of higher education to increase the numbers of minorities qualified for and serving in elementary and secondary teaching for the following reasons:

1. **To assure that a substantial portion of talented and qualified persons from all racial and ethnic groups are teachers;**
2. **To increase the number and proportion of minority role model teachers with special impact in helping minority students to succeed in education, at least through graduation from high school, and to pursue higher levels of education; and**
3. **To increase the number of minority teachers so that all elementary and secondary students will have experience with these role models, thereby advancing multicultural and multiracial understanding and appreciation.**

Proposed Action

National leadership is essential. Federal resources must be provided in partnership with states, localities, and institutions of higher education to support initiatives over at least a ten-year period. The proposed action includes three major parts. The first provides incentive awards for minority candidates in undergraduate and graduate study preparing to teach. The second provides support of programs and projects which introduce minority students in grades 7 through 12 to a teaching career. The third provides support for institutions of higher education, in conjunction with elementary and secondary schools, to enable minorities to use career ladders combining study and employment or make professional changes to enter teaching.

These provisions are not the sole means to solve the problem of increasing the numbers of minority teachers, nor are they considered to be the only steps needed to address the comprehensive problems of qualified teacher supply and demand in the United States. They are, however, the highest priority actions we now recommend.

A summary of the three parts of the proposal follows:

PROPOSED FEDERAL ACTION

I. Demonstration Programs to Increase Minority Candidates for Teaching in Elementary and Secondary Schools

Purpose:	To increase the number of minority candidates in undergraduate and graduate programs preparing to teach in elementary and secondary schools.
Eligible Recipients:	Institutions of Higher Education (IHE) compete for Federal demonstration grants administered by the State Education Agency (SEA) under an approved State Plan.
Description:	A 5-year demonstration program, authorizing $50 million federal funds annually, to be matched 50/50 by nonfederal funds and administered by the States. The Secretary of Education would allocate funds to states having approved plans which will increase the numbers of minority candidates in teacher preparation programs. Federal funds would be allocated among the states on the basis of the proportion of minority population of the state to the total minority population of the nation.

(Section I continued)

Each SEA with an approved plan would conduct a competition open to all public and private undergraduate and graduate IHEs, including community colleges, with approved teacher preparation programs. The SEA would select the most promising proposals which commit the institution to increase the number of minority candidates in its teacher preparation program. Priority would be given to institutions with records of success in enrolling and graduating minority students.

Continuation grants would be subject to annual reporting by the recipient IHE of progress made in achievement of the performance standards established in its project.

Grants to IHEs would provide incentive awards to students and the costs of administration and evaluation of demonstration projects. IHEs would make incentive awards to eligible students with a total value of $3500 a year for up to four full-time undergraduate years and $7000 for one full-time year of graduate study. Each incentive award would be used either as a "scholarship" or a "performance payment" or combination of the two as determined by the institution and student. For each student the part of the award used to support the cost of college attendance would be considered a scholarship. The amount could range from $3500 to zero for undergraduate students and $7000 to zero for graduate students. Students using the award for scholarship aid would have to meet the need criteria for eligibility for Stafford Loans under Title IV of the Higher Education Act.

The balance of the incentive award for each year would be reserved by the IHE in escrow for use as a performance payment(s) to be made at the end of each year of elementary and/or secondary teaching completed for which the candidate is obliged to serve.

Performance payments would be non-taxable. If candidates fail to complete their teaching obligation, their escrow accounts would revert to the program and be available for other candidates.

(Section I continued)

An incentive award would be in addition to any other federal, state, or institutional student aid for which the student is otherwise eligible but the part of the award used as scholarship together with other aid received in any one year could not exceed the cost of attendance in that year. It would not be considered "income" for purposes of calculating eligibility for student aid or taxes.

Incentive awards would be limited to candidates who are in good academic standing,who demonstrate their commitment to teaching by obligating themselves to complete at least one year of service in public or nonpublic elementary or secondary school for each year in receipt of an award as an undergraduate and two years of teaching for one year as a graduate student recipient. Award recipients who decide not to teach must repay the awards received with interest in lieu of teaching.

In any year the total potential demonstration grant to an IHE would be based on the proposed number of minority candidates to be increased over the number for the base year (1988-89) multiplied by $3500 per undergraduate or $7000 per graduate student year award. IHEs would have discretion as to the number of students, level of study and distribution of incentive awards among eligible students.

For administration of the State Plan and for evaluation of the demonstration projects, the state education agency would be authorized to use up to 5% of the state's allocation.

II. Introduction to Teaching

Purpose: To identify and encourage minority students in the 7th through 12th grades to aspire to and prepare for careers in elementary and secondary school teaching.

Eligible Recipients: Local Education Agencies (LEA) through State Education Agencies (SEA).

Description: Federal funds would support projects in local school districts which would include but not be limited to teaching career exploration programs, introduction to teaching partnerships of LEAs and teacher training programs,work-study, teaching assistant or tutorial programs, "future teacher" clubs or activities and special projects to prepare minority students for entry into teaching preparation programs.

Implementation: $25M per year would be allocated among states on the basis of the minority population percentage in each state to the total national minority population with no state receiving less than $50,000. States would award project funds on the basis of competitive applications from local education agencies.

III. Support Programs for Teaching Career Ladders or Career Changes to Teaching

Purpose: To attract minority candidates to careers in teaching elementary and secondary school who are in school support or paraprofessional positions, attending community colleges, or in occupations other than teaching and seek a career change to teaching.

Eligible Recipients: Institutions of Higher Education (IHE) in conjunction with Local Education Agencies (LEAs).

Description: A nationally competitive program to encourage IHEs together with LEAs to design and implement projects to encourage and enable minorities without preparation and qualifications to teach to have such preparation and gain such qualifications. Projects would include but not be limited to coordinated efforts of IHEs and LEAs for paraprofessionals to prepare for careers as licensed teachers while in paraprofessional practice, teaching career counseling services, public information recruitment

(Section III continued)	activities, identifying promising minority students attending community colleges, and career reentry projects with special professional preparation arrangements.
Implementation:	$20M per year administered by the United States Department of Education for nationally competitive IHE applications prepared in conjunction with LEAs and endorsed or commented on by the appropriate SEA.

April 6, 1989

The first witness will be Robert Atwell, President, American Council on Education; Dr. Richard Rosser, President, National Association of Independent Colleges and Universities; Dr. Adib Shakir, President, Tougaloo College on behalf of the United Negro College Fund; Mr. David Tatel, Esq., Former Director, Office of Civil Rights, now with the law firm of Hogan & Hartson.

STATEMENTS OF ROBERT ATWELL, PRESIDENT, AMERICAN COUNCIL ON EDUCATION, WASHINGTON, DC; DR. RICHARD ROSSER, PRESIDENT, NATIONAL ASSOCIATION OF INDEPENDENT COLLEGES AND UNIVERSITIES, WASHINGTON, DC; DR. ADIB SHAKIR, PRESIDENT, TOUGALOO COLLEGE ON BEHALF OF THE UNITED NEGRO COLLEGE FUND; AND DAVID TATEL, ESQ., FORMER DIRECTOR, OFFICE OF CIVIL RIGHTS, HOGAN & HARTSON, WASHINGTON, DC

Chairman **HAWKINS**. At least we will have a former Director of the Office of Civil Rights of the Department of Education.

Mr. **MFUME**. Mr. Chairman, I ask that my prepared statement be made a part of the record. May I also ask how the committee was informed by the Assistant Secretary, Mr. Williams, that he would not be here today? Was that in writing?

[The prepared statement of Hon. Kweisi Mfume follows:]

Thank you Mr. Chairman, I will make my comments brief because I am very interested in hearing our panel presentations. First, I must reiterate that I am very disturbed by the Department of Education's recent policy statements concerning minority scholarships.

Not only was this decision very abrupt, but it appears that it was made with no consultation from the affected constituencies and no indication from the Administration whatsoever that such a policy review was underway.

It further disturbs me that this action is yet another blow to the gains that minorities have made over the past twenty years and falls in line with the current offensive against the civil rights community. How many times have we been in this room to object to policies and statements that strike at the very heart of issues that affect millions of Americans.

The decision to attend college for many minorities all too often comes down to the question of can I afford it? Where it should be the case of is this institution the best for my future and what programs are offered. Minority students comprise a disproportionate number of our nation's disadvantaged student population and this country can not retreat from its pledge to help these persons lift themselves up from their bootstraps.

Like many Members of Congress, I have children who are in college and the costs of tuition and other expenses has nearly gone through the roof. How can we expect gifted students from poorer urban and rural areas to keep pace if they are not even allowed to get their foot in the door.

I have plenty of questions and concerns that I hope the Administration's representatives can address. This is not an issue that will subside overnight and I want to put you on notice that the affected communities will not take this new policy decision lying down.

Thank you Mr. Chairman.

Chairman **Hawkins**. No, it was a telephone conversation with committee counsel Govan, late yesterday, approximately 3:00 o'clock.

Mr. **Mfume**. I might ask, Mr. Chairman, whether or not the committee thinks it is necessary to try to get some clarification in writing from the Assistant Secretary.

I think the request of this committee was legitimate and deserves more than a phone call the day before he is to appear.

Chairman **Hawkins**. Well, the Chair will certainly respond to the wish of the committee. It was my intent, in view of the lack of appearance of a witness for the department, to request that questions be made directly to the department, officially.

They would go to the new secretary, at least to the new acting Secretary of Education, together with a list of specific questions that need answers. At that time I shall indicate our position that hereafter if the department intends not to appear before the committee, to provide an official explanation.

We were operating a little bit at a disadvantage because, as you know, the very day the new policy was issued, Mr. Cavazos resigned and a new name was mentioned. Because we were without leadership at the department, there was no one to call other than the Assistant Secretary for Legislative and Congressional Affairs. Ms. Kennedy is the only one I had contact with.

Mr. **Mfume**. I appreciate that, Mr. Chairman. I am expressing my own frustration. I think it is insulting to the committee and the people of this Nation that the Assistant Secretary would make this sort of policy change, then retreat on that position and then fail to show up before this committee.

But to offer a telephone call the day before by someone else indicating he would not be here; I don't believe this is the way to do business. This point needs clarification. It is difficult to clarify when a chief principal stonewalls this committee.

Mr. Chairman, I would just ask and I respectfully would request of you at least while you are still chairman of this committee and under your leadership that we could get something in writing from the Assistant Secretary as to why he chose not to appear today and answer what I am sure will be a broad range of questions of this committee that only he as Assistant Secretary could and should answer.

I appreciate that. I would yield back at this time.

Chairman **Hawkins**. I would be glad to do it if there is no objection, to write a letter on behalf of the committee requesting some explanation of his failure to appear and/or to the department itself as to whether or not some other witness was or was not available. If there is no objection, the Chair will comply with that request, and the letter together with the response will be made a part of the record.

[The material follows:]

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December 27, 1990

The Honorable Lamar Alexander
Secretary Designate
Department of Education
400 Maryland Avenue, S.W.
Washington, D.C. 20202

Dear Mr. Secretary:

I am writing to request an official explanation of the decision to cancel Assistant Secretary Williams' appearance at the Committee's December 19, 1990 oversight hearing on application of Title VI of the Civil Rights Act of 1964 to minority scholarship programs.

As you may know, on Thursday, December 13, 1990, I personally spoke with Assistant Secretary Nancy Kennedy (Office for Legislative and Congressional Affairs) and extended an invitation to Assistant Secretary Williams to testify at the Committee's December 19, 1990 hearing. That invitation was accepted. As an accommodation to Mr. Williams' schedule, I agreed to schedule him as the lead-off witness. Those arrangements were confirmed by letter dated Monday, December 17, 1990, from Assistant Secretary Kennedy to me. Needless to say, I was quite surprised to learn on Tuesday afternoon that staff of the Office of Legislative and Congressional Affairs notified Committee Counsel Reginald Govan that Mr. Williams' would not be testifying at the hearing.

As was noted by Assistant Secretary Kennedy in her December 17, 1990 letter, the hearing was scheduled to "provide an opportunity for a thorough and complete discussion of the issues." Unilateral cancellation of Mr. Williams' appearance before the Committee abrogates the obligation of all Presidential appointees subject to confirmation to appear before Congress and, indeed, of Mr. Williams' own commitment at his confirmation hearing to "appear before any duly constituted body of this Congress." (Confirmation Hearing of Assistant Secretary Williams before the Senate Labor and Human Resources Committee, May 23, 1990, p.4).

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The Honorable Lamar Alexander
Page 2
December 27, 1990

According to published news reports Assistant Secretary Williams decided not to testify because he "wanted more time to study legal cases and other material concerning the new scholarship policy" and because he had "fully explained the policy at a news conference." It is ironic that Assistant Secretary Williams asserts the need for time to study cases and other material after the Department abandoned decade long enforcement policy and after press conferences were held to announce new policies. It is also ironic that the very official who created uncertainty and instability by abruptly abandoning well settled federal policy should take it upon himself to decide when such policies have been "fully explained" as well as the forums in which such explanations are offered.

Against that background, members of the Education and Labor Committee who attended the December 19, 1990 hearing agreed to request from the Department an official explanation of Assistant Secretary Williams' failure to appear before the Committee to answer questions concerning Administration policies on minority scholarship programs.

Also enclosed is a list of questions to be answered by Assistant Secretary Williams. In order to include such answers in the official record of the hearing, I ask that they, together with answers to questions set forth in my December 18, 1990 letter, be submitted to the Committee on a timely basis.

Thank you in advance for your consideration of these matters.

Sincerely,

Augustus F. Hawkins
Chairman

AFH/rga

CHAIRMAN HAWKINS' QUESTIONS
for
ASSISTANT SECRETARY MICHAEL WILLIAMS

1. Who first suggested that the Office for Civil Rights examine the legality of the proposed Fiesta Bowl scholarship programs and who first suggested that the Office for Civil Rights write to the Director of the Fiesta Bowl and inform him that plans to donate funds for minority scholarships to the University of Louisville and the University of Alabama might be illegal?

2. With whom outside of the Office for Civil Rights was the fact of the proposed scholarship discussed? What was the substance of such discussions?

3. Please identify all federal officials who were aware that the Office for Civil Rights was reviewing or considering responding to the Fiesta Bowl scholarship program. Please identify all other individuals or groups who were aware of such.

4. Who participated in the drafting of, reviewed, or had knowledge of the development of the policy expressed in the December 4, 1990 letter to the Fiesta Bowl, the University of Louisville, the University of Alabama, and the press release.

5. Did the Office for Civil Rights notify, consult, or discuss with any higher education association, any college or university or person connected to the same before it issued its December 4, 1990 Fiesta Bowl policy and press release? What discussions were held with the University of Louisville or the University of Alabama?

6. As set forth in my December 18, 1990 letter to Secretary Designate Alexander, please provide copies of all memoranda, critiques, or analyses prepared prior to the issuance of the December 4, 1990 Fiesta Bowl policy.

7. What analyses did the Office for Civil Rights prepare regarding the potential impact of the December 4, 1990 Fiesta Bowl policy on minority enrollment in higher education or the availability of financial aid to minority students.

8. What analyses did the Office for Civil Rights prepare concerning the number, variety and scope of financial aid programs which consider race in awarding such aid prior to announcing its December 4, 1990 Fiesta Bowl policy?

9. What analyses did the Office for Civil Rights prepare concerning the potential effect of financial aid programs which by their terms may have the effect of limiting participation by minority students (i.e., scholarships designated for members of particular nationality, or ethnic groups, for students from certain geographical areas, for children of alumni, etc.)

10. Did the Office for Civil Rights consider the potential impact of the December 4, 1990 Fiesta Bowl policy on financial aid programs which consider a students' gender or religion before it issued the policy?

11. Please answer each of the above questions with reference to the December 18, 1990 policy.

12. Have any of the analyses referenced in questions 7, 8, 9, and 10 been initiated or prepared since the December 18, 1990 Fiesta Bowl policy?

13. With respect to paragraph 2 of the December 18, 1990 policy, what is the legal basis for distinguishing between the legality of minority scholarships which are funded by a university's own funds and those established and funded entirely by private persons or entities?

14. With respect to paragraph 3 of the December 18, 1990 policy, what is the legal basis for the conclusion that race-exclusive scholarships funded by state and local governments cannot be addressed administratively?

    Does the rationale or legal basis for that conclusion extend to other race-based educational decisions made by state and local governmental entities? If not, why not?

15. With respect to paragraphs 4 and 5 of the December 18, 1990 policy, will OCR during the four year transition period require scholarship programs to be modified in order to comply with the policy.

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December 18, 1990

The Honorable Lamar Alexander
Secretary
Department of Education
400 Maryland Avenue, S.W.
Washington, D.C. 20202

Dear Mr. Secretary:

I have read with interest that the Department by letter and press release dated December 4, 1990 modified its long-standing policy concerning the application of Title VI to scholarship programs.

Based on those reports, concerns have been raised about whether such a policy is consistent with existing law and precedent governing the Department's administration of Title VI.

To that end, I request the Department to provide to the Committee a copy of its complete file in this matter including but not limited to the following documents:

(1) names, and summary of the role played by all persons who participated in, were consulted, or discussed the December 4, 1990 policy prior to its adoption;

(2) memorandum, critiques and other analyses of the December 4, 1990 policy at all stages of its development;

(3) OCR opinion letters prior to the December 4, 1990 policy reviewing the legality of race, ethnic, or gender sensitive scholarship/financial aid programs, including, but not limited to, the University of Denver (March 1983 and 1989) and the Massachusetts Institute of Technology (September 1981); and matters referred by the Assistant Secretary at today's press conference, including the 1986 "Dutch American," 1988 - "Darthmouth" issue and 1990 "other individual matters in which the Assistant Secretary and Deputy Assistant Secretary took position.

It is my understanding that Committee counsel has already requested and received many of these such documents during the past two days.

Thank you in advance for your attention to this matter.

Sincerely,

Augustus F. Hawkins
Chairman

AFH/rga

UNITED STATES DEPARTMENT OF EDUCATION
THE SECRETARY

February 14, 1991

Hon. William Ford
Chairman
House Committee on Education and Labor
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman

This is in response to the letters from former Chairman Hawkins of December 18 and 27, 1990 and your letter of February 1, 1991 regarding the minority scholarships issue.

The Department shares the Education and Labor Committee's commitment to ensuring educational opportunity for all Americans, and we will work closely with you toward that end. With regard to your Committee's request for testimony by Assistant Secretary Michael Williams, we regret that he was unable to appear. However, having just formulated a new position on this issue the previous day, we did not believe that we had adequate preparation time for a proper presentation before your Committee.

As you are aware, at his confirmation hearing Secretary Designate Lamar Alexander indicated that upon taking office he "would start over... (w)e'll go back to the policy...that existed before December 4." In his hearing, Governor Alexander told the Senate Labor and Human Resources Committee that if confirmed, he would immediately begin a thorough review of this issue that would include consultation with Administration officials (including the Attorney General), Congress, and experts in the civil rights and higher education communities. I believe this statement by Secretary Designate Alexander should address most of your concerns with the earlier announced policy.

I am providing you with the documents requested in your earlier letters. The enclosed documents are being made available to the committee pursuant to 5 U.S.C. 552(d) for review in the exercise of the committee's oversight responsibilities. These include draft documents, advisory and legal memoranda that reflect the agency's internal deliberations and documents in open investigations. The Department does not authorize disclosure of these documents or any portion of them.

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We are particularly concerned with safeguarding the confidentiality of the names of the complainant and witnesses in the investigations. Any improper release of such information could subject innocent persons to harm. The disclosure of files of active investigations may impede the timely completion of investigations and actually jeopardize successful voluntary compliance effort. Thus, the need for confidentiality concerning their contents by Members of the Committee and Committee staff is critical. I appreciate the assurances of confidentiality contained in your February 1 letter. I look forward to working with you on this and other education issues in the 102nd Congress.

Sincerely,

Ted Sanders

Ted Sanders
Acting Secretary

cc: Hon. Bill Goodling

Enclosures

Mr. Atwell, you may proceed.

Mr. **Atwell**. Mr. Chairman, you have performed countless acts of leadership on behalf of education in this country. Thus it is fitting that you hold this, perhaps the last hearing of your long and illustrious tenure on this committee, on matters so important to the Nation. I must note for the record that the directors of the American Council on Education will have the pleasure of awarding you our award for distinguished lifetime service to higher education. That is an award you richly deserve and some of us in this room will be there in San Francisco to be sure you receive it properly.

I am here to testify today on the policy concerning race-designated scholarships announced recently by the Education Department's Assistant Secretary for Civil Rights. I have a statement I would be pleased to have inserted in the record together with a letter sent to John Sununu at the White House.

We vehemently oppose the policy the Assistant Secretary announced. We believe it is misguided, poorly reasoned and just plain wrong. Having said that, let me elaborate on several of our concerns. First I am appalled at the abysmal process followed by the Department of Education in formulating and announcing what constitutes a radical shift from past interpretation and procedures. We first learned about this new opinion on December 4, when the Office for Civil Rights sent out a press release along with a letter from Assistant Secretary Williams to the director of the Fiesta Bowl. To my knowledge, at no time prior to that date did anyone from the Office for Civil Rights consult with any member of the higher education community here in Washington or elsewhere, or with any Member of Congress, or give any indication that existing policy in this area was under review.

Using this method to announce a policy change of such magnitude is particularly disturbing in light of positions taken previously by the department over an extended period of time. A letter to a football bowl committee is not the way to try to change public policy, especially when literally hundreds of institutions and tens of thousands of students would be affected.

Yesterday, the Assistant Secretary held a press conference and released a new policy statement that altered part of the opinion articulated in the Fiesta Bowl letter. However, this policy statement only increased confusion and uncertainty about the status of minority scholarships, for reasons I will detail later.

Needless to say, this process of policy-making by press release and press conference has caused considerable consternation and confusion among colleges, students, and members of the public. It has raised a myriad of questions that were left unanswered in the press release, the letter, public statements by the Assistant Secretary, and yesterday's policy statement.

Second, as to the substance of this policy, we believe it would trammel the legally protected rights of colleges and universities to encourage minority participation in American higher education. It is inconsistent with the policy of all prior administrations that have addressed this question, regardless of political party. And, it is inconsistent even with the few legal precedents cited by the Assistant Secretary.

Minority scholarships and fellowships have been recognized by the Federal Government as an essential feature of strategies to encourage diversity in college and university student populations. The executive branch, including President Bush, the Congress, and the Supreme Court have for many years expressed their approval of diversity as a compelling interest for institutions of higher education. Congress has also supported expansion of opportunities for minorities in higher education by enacting Federal financial aid programs for minorities, including the Patricia Roberts Harris Fellowship Program and the Graduate and Professional Opportunities Program. These efforts are consistent with the objectives expressed in Executive Order 11246 and many other presidential actions over the decades.

Programs of minority-targeted student financial aid are unconnected with admissions decisions. Their availability helps to increase and diversity the pool of qualified students able to pursue higher education, and results in broader inclusion of qualified students from all backgrounds in our colleges and universities. Unlike the minority admissions program invalidated in the Bakke case, such programs do not entail quotas. Nor do they curtail the admission on nonminority students. If they have any effect on financial aid available to nonminorities, the impact is minimal, widely diffused, and within legal limits.

All prior administrations that have examined this issue have approved minority scholarship and fellowship programs. For example, in 1983 the Office for Civil Rights concluded that three fellowship programs for minorities at the University of Denver were legally permissible and consistent with the Bakke decision. Similarly, the Internal Revenue Service has permitted tax-exempt organizations to maintain minority-targeted scholarship and fellowship'funds as long as the financial aid program as a whole is nondiscriminatory.

Although some have interpreted the policy statement released yesterday by the Assistant Secretary as a retreat from or a reversal of the position taken in the Fiesta Bowl letter, we do not believe that is the case. The policy statement apparently creates a very narrowly drawn class of minority scholarships—those "established and funded entirely by private persons or entities where the donor restricts eligibility for such scholarships to minority students"—that would be considered legal. Upon what basis, we are not told. It also states that institutions may not use their own funds for minority scholarships. And, although it does not cite any particular cases, the statement implies that Supreme Court decisions outlaw minority scholarships funded by state and local governments.

I believe this creates a distinction without a difference. Once money is given to a college or university, it generally is considered institutional funds. That is certainly the case with public institutions, where money donated for scholarships is considered public funds, no matter what the source, and subject to the annual state appropriations process. In addition, let me emphasize, Mr. Chairman, that privately donated and designated scholarships constitute only a tiny minority of the awards that currently go to minority students. The vast majority of minority scholarships are funded by state governments or by the institutions themselves out of their own resources.

The four-year transition period offered by the department for schools to bring their practices into conformance with its interpretation of the law does not mitigate the highly discouraging message this policy sends to institutions, students, state lawmakers, and potential donors. It creates an unnecessary stigma around all minority scholarship programs, an impression that those now in existence are living on borrowed time because they are illegal, and it fosters an incorrect and divisive public impression that scholarships for minority students are somehow denying other students their rightful place in our nation's colleges and universities.

The policy statement also invites a surge of lawsuits against institutions and complaints to the Office of Civil Rights—complaints, I might add, that the office is poorly equipped to handle. It also raises a host of questions about whether the same arguments applied to minority scholarships will be extended to scholarships restricted by gender, national origin, religious affiliation, or handicapped status.

Mr. Chairman, the institutions that will be most affected by this policy shift are private colleges and universities and the more selective public institutions. Those are the institutions that are having the most difficulty attracting and retaining minority students, and that in the past several years have been increasing significantly their efforts in this area. From the President on down, these institutions have been urged to demonstrate their commitment to minority educational advancement. Yet now, the Administration would deprive them of an essential tool to do so.

I need hardly tell this committee how crucial it is for the United States to make every effort to guarantee that minority citizens are incorporated into the mainstream of American life. Just two years ago, this committee held a hearing on a report issued by the Commission on Minority Participating in Education and American Life entitled, "One-Third of the Nation." The commission was sponsored by the American Council on Education and the Education Commission of the States. It consisted of almost 40 distinguished Americans and former presidents Gerald Ford and Jimmy Carter served as honorary co-chairs.

The report revealed a wealth of data and information on the status of minority Americans and reached a disturbing conclusion: America is moving backward—not forward—in its efforts to achieve the full participation of minority citizens in the life and propriety of the Nation. It found that our economic future, our international credibility, and the viability of our democratic society hinged on our capacity to reverse this decline.

The commission set a challenge for the Nation: within 20 years to surpass the progress of the previous 25, and to eliminate the gaps that mark so many in our racial and ethnic minority population as disadvantaged. It identified strategies for all sectors of American society—government, educational institutions, businesses and corporations, and the voluntary sector—to achieve that goal.

Mr. Chairman, we have barely begun that effort. This thoughtless policy, announced so casually by the Office for Civil Rights, would take us another giant step backward. I think it is significant that it has been opposed not only by those of us in higher education but by such organizations as the U.S. Chamber of Commerce and corporate members of the Business-Higher Education Forum, who recognize that we must expand opportunity for our growing number of minority citizens if we are to have a well-educated, competitive work force.

We hope the Administration recognizes the error of this approach and the foolishness of pursuing such a policy. If not, Mr. Chairman, we certainly hope the Congress will undertake *to* reverse the policy and deny the Administration the opportunity of putting it into effect.

Thank you, Mr. Chairman.

[The prepared statement of Robert Atwell and letter to John Sununu follows:]

Testimony by Robert H. Atwell
President, American Council on Education
House Committee on Education and Labor
Wednesday, December 19, 1990

Mr. Chairman and members of the Committee, I want to thank you for the opportunity to testify today on the policy concerning race-designated scholarships announced recently by the Education Department's assistant secretary for civil rights. I want to say at the outset that the American Council on Education vehemently opposes this policy. We believe it is misguided, ill-considered, poorly reasoned, and just plain wrong. Having made our position clear, let me outline several of our concerns.

First, I am appalled at the abysmal process followed by the Department of Education in formulating and announcing what constitutes a radical shift from past interpretation and procedures. We first learned about this new opinion on December 4, when the Office for Civil Rights sent out a press release along with a letter from Assistant Secretary Williams to the director of the Fiesta Bowl. To my knowledge, at no time prior to that date did anyone from the Office for Civil Rights consult with any member of the higher education community here in Washington or elsewhere, or with any member of Congress, or give any indication that existing policy in this area was under review.

Using this method to announce a policy change of such magnitude is particularly disturbing in light of positions taken previously by the department over an extended period of time. A letter to a football bowl committee is not the way to try to change public policy, especially when literally hundreds of institutions and tens of thousands of students would be affected.

Yesterday, the assistant secretary held a press conference and released a new policy statement that altered part of the opinion articulated in the Fiesta Bowl letter. However, this policy statement only increased confusion and uncertainty about the status of minority scholarships, for reasons I will detail later.

Needless to say, this process of policy-making by press release and press conference has caused considerable consternation and confusion among colleges, students, and members of the public. It has raised a myriad of questions that were left unanswered in the press release, the letter, public statements by the assistant secretary, and yesterday's policy statement.

Second, as to the substance of this policy, we believe it would trammel the legally protected rights of colleges and universities to encourage minority participation in American higher education. It is inconsistent with the policy of all prior administrations that have addressed this question, regardless of political party. And, it is inconsistent even with the few legal precedents cited by the assistant secretary.

Minority scholarships and fellowships have been recognized by the federal government as an essential feature of strategies to encourage diversity in college and university student populations. The executive branch, including President Bush, the Congress, and the Supreme Court have for many years expressed their approval of diversity as a compelling interest for institutions of higher education. Congress has also supported expansion of opportunities for minorities in higher education by enacting federal financial aid programs for minorities, including the Patricia Roberts Harris Fellowship Program and the Graduate and Professional Opportunities Program. These efforts are consistent with the objectives expressed in Executive Order 11246 and many other presidential actions over the decades.

Programs of minority-targeted student financial aid are unconnected with admissions decisions. Their availability helps to increase and diversify the pool of qualified students able to pursue higher education, and results in broader inclusion of qualified students from all backgrounds in our colleges and universities. Unlike the minority admissions program invalidated in the Bakke case, such programs do not entail quotas. Nor do they curtail the admission of nonminority students. If they have any effect on financial aid available to nonminorities, the impact is minimal, widely diffused, and within legal limits.

All prior administrations that have examined this issue have approved minority scholarship and fellowship programs. For example, in 1983 the Office for Civil Rights concluded that three fellowship programs for minorities at the University of Denver were legally permissible and consistent with the Bakke decision. Similarly, the Internal Revenue Service has permitted tax-exempt organizations to maintain minority-targeted scholarship and fellowship funds as long as the financial aid program as a whole is nondiscriminatory.

Although I am not an attorney, I am told by legal counsel with long experience in this area that the authorities on which the Office for Civil Rights apparently relies do not support the position expressed in the Fiesta Bowl letter or its more recent policy statement. Bakke was decided over a decade ago, in 1978, and, as I have noted, OCR took that decision into account in its subsequent approvals of minority scholarship and fellowship programs.

The Civil Rights Restoration Act has no impact here. Even under the Supreme Court's restrictive decision in Grove City College v. Bell, the "student financial aid program" as a whole remained subject to federal civil rights statutes. Accordingly, the enactment of the Civil Rights Restoration Act had no effect on minority scholarship and fellowship programs.

Nor, evidently, does the Supreme Court's decision in City of Richmond v. J.A. Croson Co. or a variety of other cases cited by the assistant secretary support this new position. I will be happy to provide the Committee with further documentation from counsel on the legal aspects of this issue.

Although some have interpreted the policy statement released yesterday by the assistant secretary as a retreat from or a reversal of the position taken in the Fiesta Bowl letter, we do not believe that is the case. The policy statement apparently creates a very narrowly drawn class of minority scholarships -- those "established and funded entirely by private persons or entities where the donor restricts eligibility for such scholarships to minority students" -- that would be considered legal. Upon what basis, we are not told. It also states that institutions may not use their own funds for minority scholarships. And, although it does not cite any particular cases, the statement implies that Supreme Court decisions outlaw minority scholarships funded by state and local governments.

I believe this creates a distinction without a difference. Once money is given to a college or university, it generally is considered institutional funds. That is certainly the case with public institutions, where money donated for scholarships is considered public funds, no matter what the source, and subject to the annual state appropriations process. In addition, let me emphasize, Mr. Chairman, that privately donated and designated scholarships constitute only a tiny minority of the awards that currently go to minority students. The vast majority of minority scholarships are funded by state governments or by the institutions themselves out of their own resources.

The four-year transition period offered by the department for schools to bring their practices into conformance with its interpretation of the law does not mitigate the highly discouraging message this policy sends to institutions, students, state lawmakers, and potential donors. It creates an unnecessary stigma around all minority scholarship programs, an impression that those now in existence are living on borrowed time because they are illegal, and it fosters an incorrect and divisive public impression that scholarships for minority students are somehow denying other students their rightful place in our nation's colleges and universities.

The policy statement also invites a surge of lawsuits against institutions and complaints to the Office for Civil Rights -- complaints, I might add, that the office is poorly equipped to handle. It also raises a host of questions about whether the same arguments applied to minority scholarships will be extended to scholarships restricted by gender, national origin, religious affiliation, or handicapped status.

Mr. Chairman, the institutions that will be most affected by this policy shift are private colleges and universities and the more selective public institutions. Those are the institutions that are having the most difficulty attracting and retaining minority students, and that in the past several years have been increasing significantly their efforts in this area. From the President on down, these institutions have been urged to demonstrate their commitment to minority educational advancement. Yet now, the administration would deprive them of an essential tool to do so.

I need hardly tell this Committee how crucial it is for the United States to make every effort to guarantee that minority citizens are incorporated into the mainstream of American life. Just two years ago, this Committee held a hearing on a report issued by the Commission on Minority Participation in Education and American Life entitled "One-Third of A Nation." The commission was sponsored by the American Council on Education and the Education Commission of the States. It consisted of almost 40 distinguished Americans, and former presidents Gerald Ford and Jimmy Carter served as honorary co-chairs.

The report reviewed a wealth of data and information on the status of minority Americans and reached a disturbing conclusion: America is moving backward -- not forward -- in its efforts to achieve the full participation of minority citizens in the life and prosperity of the nation. It found that our economic future, our international credibility, and the viability of our democratic society hinged on our capacity to reverse this decline.

The commission set a challenge for the nation: within 20 years to surpass the progress of the previous 25, and to eliminate the gaps that mark so many in our racial and ethnic minority population as disadvantaged. It identified strategies for all sectors of American society -- government, educational institutions, businesses and corporations, and the voluntary sector -- to achieve that goal.

Mr. Chairman, we have barely begun that effort. This thoughtless policy, announced so casually by the Office for Civil Rights, would take us another giant step backward. I think it is significant that it has been opposed not only by those of us in higher education but by such organizations as the U.S. Chamber of Commerce and corporate members of the Business-Higher Education Forum, who recognize that we must expand opportunity for our growing number of minority citizens if we are to have a well-educated, competitive work force.

We hope the administration recognizes the error of this approach and the foolishness of pursuing such a policy. If not, Mr. Chairman, we certainly hope the Congress will undertake to reverse the policy and deny the administration the opportunity of putting it into effect.

AMERICAN COUNCIL ON EDUCATION
Office of the President

December 17, 1990

BY HAND

Honorable John H. Sununu
Chief of Staff to the President
The White House
1600 Pennsylvania Avenue, N.W.
Washington, D.C. 20500

Re: Minority Scholarships and Fellowships

Dear Mr. Sununu:

The December 4 letter from the Department of Education's Office of Civil Rights to the Fiesta Bowl reverses long-established, repeatedly declared, sound federal policy approving scholarships and fellowships for minority students. OCR's letter has caused dismay throughout the higher education community and elsewhere. I write on behalf of the American Council on Education, whose members are more than 1500 colleges and universities located throughout the country -- public and private, large and small, urban and rural. We wish to emphasize that OCR's advice in the Fiesta Bowl letter (1) trammels legally protected rights to encourage minority participation in American higher education, (2) is inconsistent with the policy of all prior administrations that have addressed the question, regardless of political party, (3) is devoid of citation to legal precedents, while the relevant precedents are inconsistent with the letter, (4) is the product of a failure of analysis or consultation, and (5) would if put into effect result in a profound setback to efforts long encouraged by the federal government and the schools to foster minority participation. The letter should be rescinded or superseded by a reaffirmation of the government's long-standing policy.

1. Minority scholarships and fellowships are consistent with articulated constitutional and statutory policy encouraging diversity in college and university student populations. The Executive branch, Congress, and the Supreme Court have for many years expressed their approval of diversity as a compelling interest for institutions of higher education. See Regents of the University of California v. Bakke, 438 U.S. 265 (1978); Metro Broadcasting, Inc. v. Federal Communications Commission, 110 Sup. Ct. 2997 (1990). Congress has also expressed its support of expanding opportunities for minorities in higher education, by enacting federal financial aid programs for minorities, including the Patricia Roberts Harris Fellowship Program and the Graduate and Professional

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Opportunities Program. See 20 U.S.C. 1134d, 1134e(d)(3); 34 C.F.R. 649.1, 649.12. These efforts are consistent with the objectives expressed in Executive Order 11246 and many other Presidential actions over the decades. Title VI should be interpreted in light of these Congressional declarations of policy as well as Executive and judicial pronouncements.

Unconnected with admissions decisions, programs of minority-targeted student financial aid increase and diversify the pool of qualified students able to pursue higher education, and result in broader inclusion of qualified students from all backgrounds in our colleges and universities. Unlike the minority admissions program invalidated in *Bakke*, such programs do not entail quotas. Nor do they curtail the admission of nonminority students. If minority scholarship programs have any effect on financial aid available to nonminorities, the impact is minimal, widely diffused, and within legal limits. See, for example, *Wygant v. Jackson Board of Education*, 476 U.S. 267, 280-82 (1986); *Metro Broadcasting, Inc. v. Federal Communications Commission*, 110 S.Ct. at 3025-26; *Vaughn v. Board of Education of Prince George's County*, 742 F. Supp. 1275, 1303 (D. Md. 1990); *Flanagan v. President and Directors of Georgetown College*, 417 F. Supp. 377 (D.D.C. 1976) (set-aside of 60 percent of institutional aid for minority or disadvantaged students in first year law class violated Title VI).

2. All prior administrations that have examined the question have approved minority scholarship and fellowship programs. For example, in 1983 OCR concluded that three fellowship programs for minorities at the University of Denver were legally permissible. OCR reasoned:

> We do not believe that *Bakke* is controlling as to the award of student financial aid, as the decision addresses issues relating only to admissions. It is important to note the distinction between financial aid and admissions. It is our understanding that students are admitted to the University of Denver Graduate School of Business and Public Management according to ordinary criteria. The issue in this case is not one of exclusion from the school on the basis of race or national origin.

Memorandum from G. Roman to J. Standlee (March 22, 1983); see also, for example, Letter from B. Taylor (March 24, 1982);

Memorandum from A. Califa to R. Randolph (September 11, 1981). Similarly, the Internal Revenue Service has permitted tax-exempt organizations to maintain minority-targeted scholarship and fellowship funds as long as the financial aid program as a whole is nondiscriminatory. See Rev. Proc. 1975-50, 1975-2 C.B. 589. Thus, official federal policy has long been that such programs are legally permissible.

3. The legal authorities on which OCR apparently relies (none are cited in the Fiesta Bowl letter) do not support the position expressed in the letter. Bakke was decided over a decade ago, in 1979, and as noted above OCR expressly took that decision into account in its subsequent approvals of minority scholarship and fellowship programs.

The Civil Rights Restoration Act, Pub. L. No. 100-259, has no impact here. Even under the Supreme Court's restrictive decision in Grove City College v. Bell, 465 U.S. 555, 571 (1984), the "student financial aid program" as a whole remained subject to federal civil rights statutes. Accordingly, the enactment of the Civil Rights Restoration Act had no effect on minority scholarship and fellowship programs.

Nor does the Supreme Court's decision in City of Richmond v. J.A. Croson Co., 109 S. Ct. 706 (1989), support OCR's new position. In Croson the Court invalidated on two grounds a Richmond ordinance that required prime contractors on city construction contracts to subcontract 30 percent of each prime contract to minority-owned businesses. Id. at 712-13. The Court concluded, first, that the City Council had failed to establish sufficient evidence of past discrimination against minority contractors in the Richmond area to justify a race-restricted contracting program. Id. at 727. Second, the Court described the 30-percent subcontracting requirement as a "rigid, numerical quota". Id. at 728.

Neither of the Court's concerns in Croson has any bearing on the administration of minority scholarships and fellowships by colleges and universities. First, colleges and universities with minority scholarship or fellowship programs have adopted them to further diversity within their student bodies. Thus, in many cases whether or not a college or university has a record of past discrimination is immaterial to its legal authority to undertake a minority scholarship or fellowship program.

Secondly, the minority-targeted financial aid programs administered by higher education institutions do not form a barrier to entry of nonminorities to our nation's colleges and universities. In accordance with *Bakke*, many colleges and universities can and do make admissions decisions by taking race into account as one of a number of considerations in the admissions process. *See Regents of the University of California v. Bakke*, 438 U.S. at 316-18. Admissions decisions are generally made separately from financial aid decisions, and the availability of minority scholarships and fellowships has not caused nonminorities to be denied admission.

Nor has the availability of minority-directed financial aid denied nonminorities the assistance necessary to finance higher education. Typically, once an institution has made its admissions decisions, the institution determines the type of financial aid that may be offered to students requesting it. In accordance with the guidance from OCR and the Internal Revenue Service discussed above, colleges and universities have targeted scholarship and fellowship funds for minorities in such a manner that the financial aid program as a whole remains nondiscriminatory.

4. The Fiesta Bowl letter is the result of a failure of analysis or consultation. There can be little doubt that the overwhelming consensus of persons informed of and concerned with the subject strongly supports minority scholarship and fellowship programs. In addition to very broad private philanthropic support for efforts of this kind, the federal government and a number of state governments have specifically legislated minority-targeted higher education financial aid programs that are currently in effect. We find it virtually unthinkable that a decision of the gravity and ramifications of the one announced in the Fiesta Bowl letter would be taken without any opportunity for those affected by it to comment. The effect of such rash process, unless promptly reversed, inevitably would be to inhibit efforts of great importance to the United States at a time when minority participation is essential to our nation's well-being. We note, for example, the widely reported decline in minority enrollments in a number of higher education programs. Some may question as a matter of public policy if not as a matter of law minority-targeted government funding in this area, but we can find no warrant in policy or law for a rule prohibiting private philanthropy aimed at encouraging minority participation.

5. This administration has expressed the urgency it attaches to making education a national priority and to ensuring that all able citizens have access to colleges and universities. ACE and many other groups have strongly supported that objective and called on member institutions and the nation at large to renew their commitment to educate members of minority groups that not only have suffered historic discrimination, but represent an increasingly vital part of the nation's destiny. *See* American Council on Education and the Education Commission of the States, *One-third of a Nation: A Report of the Commission on Minority Participation in Education and American Life* (chaired by Presidents Ford and Carter) (May 1988). As Justice Powell stated, "[I]t is not too much to say that the 'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples." *Regents of the University of California v. Bakke*, 438 U.S. 265, 313 (1978) (quoting *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967)).

In the Fiesta Bowl letter OCR suggests that colleges and universities can achieve the goal of expanding minority access to higher education through scholarships and fellowships directed toward disadvantaged students or financial aid programs "in which race is considered a positive factor amongst similarly qualified individuals if the institution is one where there has been limited participation of a particular race." Although such programs do exist, ACE and its member institutions believe based on extensive experience that scholarships and fellowships designated for minority students remain essential to providing minorities with meaningful access to higher education. Such programs are not so disproportionate as to render discriminatory financial aid programs as a whole. Within appropriate limits, the programs play an important role in focusing the attention of applicants as well as the institution on the objective of recruiting qualified minority students.

Minority scholarship and fellowship programs have not limited nonminority access to higher education, nor have they imposed quotas. Instead, they foster the national objective of making higher education available to all qualified students.

The American Council on Education urges the administration to withdraw OCR's policy change as reflected in the Fiesta Bowl letter and to confirm that prior policy approving minority-targeted financial aid remains in effect.

We appreciate your consideration of our concerns.

Sincerely,

Robert H. Atwell
President

cc: C. Boyden Gray, Esquire

bcc: Sheldon E. Steinbach, Esquire

Chairman **Hawkins**. Thank you, Mr. Atwell.

Our next witness is Dr. Adib Shakir, President, Tougaloo College, on behalf of the United Negro College Fund.

Mr. **Shakir**. Thank you, Mr. Chairman.

Mr. Chairman, I am Adib Shakir, President of Tougaloo College in Tougaloo, Mississippi. Tougaloo College was founded in 1869 by the American Missionary Society of New York and is now affiliated with the Christian Church, Disciples of Christ, and the United Church of Christ. We offer the Associate of Arts in Early Childhood Education, in addition to the Bachelor of Arts Degree and Bachelor of Science Degrees. Our academic program emphasizes the physical and natural sciences, mathematics and computer science. In addition, our social sciences program features solid offerings in political science and psychology. Our uniqueness as an academic institution lies in our external academic programs, including the African study travel project and the creative writing workshop, as well as our student exchange programs with Brown University and Bowdown College. We also offer cooperative academic programs with many outstanding colleges and universities around the country, including Boston University, Early Medical School Selection Program, Brown University, Early Identification Program in Medicine, Howard University, Tuskegee University, Georgia Institute of Technology, University of Mississippi and University of Wisconsin at Madison, Joint Engineering Degree Programs.

I appear before you today on behalf of the United Negro College Fund, UNCF, and the 41 member college presidents who serve the more than 48,000 students from almost every state and 30 foreign countries. UNCF colleges and universities are integrated institutions which include more than 1000 non-minority students who attend our member institutions each year. Since most UNCF students come from low income families—almost 90 percent of our students receive financial aid—they are highly dependent on Federal, state and institutional support to pay their college costs.

I want to commend you, Mr. Chairman, for your willingness and dedication to hold this hearing to gather public support for continuing the various institutional minority scholarship programs, and to provide a forum to express our opposition to this proposed retreat from the Nation's commitment to equal opportunity in higher education. I am pleased to join my colleagues, Bob Atwell of the American Council on Education, ACE, and Dick Rosser of the National Association of Independent Colleges and Universities, NAICU, here today. We want you to know that the higher education community—public and private, traditionally white and historically black—is united in its opposition to the initiative announced by Assistant Secretary Michael L. Williams on December 12, 1990. Further, we are equally concerned about the revision or "reversal" announced yesterday. We share a common view that every young man or woman, regardless of family income, heritage or circumstances, ought to have the opportunity to attend college. For most minority students, whether they are black, Hispanic or Indian, that means providing financial assistance to overcome generations of discrimination against their parents and grandparents in employment. The legacy of race and national origin discrimination in America obligates this Nation to use every possible weapon in the fight to make equal opportunity in higher education a reality, not just rhetoric for minorities in America.

As President of Tougaloo College, with its 950 students pursuing their dream and their family's dream of a college education, I was shocked to learn last week that the Department of Education planned to embrace a policy which would eliminate scholarships for minorities because they discriminate against non-minority students. My colleagues in UNCF and I were outraged that a relatively inexperienced presidential appointee would propose the reversal of a decades long Federal commitment to equal opportunity in higher education. To have done so without consulting with key officials in the Department of Education—not to mention anyone at the White House—raises a concern about where minority education and "civil rights" are on our national agenda in 1990.

Several things are clear. Even as the White House seeks to unscrabble the law and its own policy in this area; and as we assess the damage already wrought when we make public policy by press conference; and we entrust the futures of thousands of African-Americans, Hispanic Americans, and Native Americans to those who place politics above principle—we must remain vigilant and committed.

First, Mr. Williams needs to review his history because he seems to have forgotten that it took Congress almost 30 years after the first Morrill Act, to create "separate but unequal" historically black land grant colleges. Almost 100 years later, black and Hispanic youngsters remain in largely-segregated urban school districts receiving below quality preparation for the economic and educational challenges of the year 2000 and beyond. Their certificates of attendance often return to haunt them when they enter college or seek employment in our technological society.

Second, Mr. Williams needs to review the statistical realities of minority participation in higher education. Notwithstanding the fact that increasing numbers of African-Americans are graduating from high school, their enrolled-in-college rates continue to decline. According to ACE's eighth annual status report on "Minorities in Higher Education" between 1976 and 1988, the enrolled in college rate of dependent, low-income African-American high school graduates dropped from 40 percent to 30 percent, while the percentage of low income Hispanic high school students graduates going on to college fell from 50 percent to 35 percent. Even more disturbing is the fact that in 1989, the number of black males 18 to 24 years old who were in prison, on parole or on probation exceeded the number of 18 to 24 year old black males enrolled in college.

Third, apparently Mr. Williams apparently has forgotten the admonition in "One-Third of a Nation" regarding minority progress in American society. "America is moving backward—not forward—in its efforts to achieve the full participation of minority citizens in the life and prosperity of the Nation . . . In education, employment, income, health, longevity, and other basic measures of individual and social well-being, gaps persist—and in some cases are widening—between members of minority groups and the majority population . . . If we allow these disparities to continue, the United States will suffer a compromised quality of life and a lower standard of living." "One-Third of a Nation" May 1988.

It is apparent to me that the Nation's success at fulfilling its decades long commitment to eliminating racial and financial barriers to college participation for minorities represents something less than complete victory.

UNCF joints today, with the rest of the higher education community, in repudiating the efforts of some in this Administration to renege on America's promise to her citizens of color. Dr. Martin Luther King, Jr. summarized that promise in his 1963 March on Washington speech at the Lincoln Memorial:

"In a sense we have come to our Nation's Capital to cash a check. When the architects of our great republic wrote the magnificent words of the Constitution and the Declaration of Independence, they were signing a promissory note to which every American was to fall heir.

"This note was a promise that all men, yes black men as well as white men, would be guaranteed the inalienable rights of life, liberty, and the pursuit of happiness.

"It is obvious today that America has defaulted on this promissory note insofar as her citizens of color are concerned. Instead of honoring this sacred obligation, America has given its colored people a bad check, a check that has come back marked 'insufficient funds.'

"But we must refuse to believe that the bank of justice is bankrupt. We refuse to believe that there are insufficient funds in the great vaults of opportunity of this nation. So we have come to cash this check, a check that will give us upon demand the riches of freedom and the security of justice." "I Have a Dream," Martin Luther King, Jr. 1963.

The major question that arises from the events of last week and the announcement by Assistant Secretary Williams was not answered by the President's decision to reverse the 'Civil rights policy by press release' affecting minority scholarships. In fact, those of us who are most concerned about assuring that minorities of all income levels and educational backgrounds have that opportunity to enter and complete college need to redouble our efforts.

The Department of Justice and others in the Bush Administration intend to destroy affirmative efforts to eliminate the vestiges of racial segregation in America, and to dismantle Federal efforts designed to equalize opportunity in America. News accounts of the meeting called on Monday by White House Chief of Staff John Sununu with Assistant Secretary Williams makes it quite clear that the reversal decision was based on political, not substantive grounds. Tuesday morning's Washington Post indicated that both the White House counsel and the Justice Department lawyers agreed with Williams interpretation of the Civil Rights Act of 1964 and relevant court opinions prohibit "race-specific" scholarships. The fact that the minority scholarships "grenade" is being rolled "... back into the Education Department's backyard ... whence it came" does not mean that we have seen the last of it.

Recent history, in fact, suggests that we will certainly see it again. Twice during the 101st Congress, the Bush Administration Justice Department opposed Congress' efforts to provide "race-specific" minority scholarship and loan assistance for persons entering the health professions. H.R. 3240/S. 1606, the Disadvantaged Minority Health Improvement Act, and entering the handicapped teaching profession, H.R. 1013, The Education of the Handicapped Amendments of 1990. In both instances, the Justice Department, in letters of opposition to Senator Kennedy and Congressman Owens, cited Croson as the basis for their view that even Congress may not enact a remedial racial preference or race specific "set-asides" when racially-neutral alternatives are available. This same line of reasoning has been advanced here in support of the elimination of minority scholarships.

The Justice Department's consistent position has been one of opposition to affirmative efforts to enhance minority access to higher education. Justice's reading of Bakke precludes the consideration of race in making admissions decisions and aid award decisions. Their reading of Croson, which we believe to be inapplicable to financial aid decisions by institutions of higher education, is both narrow and inaccurate.

The Department of Justice's and the Department of Education's consistently prescriptive reading of both Bakke and Croson underlie their misguided attempts to constrain both Congress' and the higher education community's efforts to reverse centuries of discrimination by implementing affirmative efforts to enroll and graduate minority students. We believe that Bakke provides ample guidance to colleges and universities: One, seeking to provide scholarships to highly qualified minority students as a means of diversifying their student body and enhancing the representation of minorities in certain career fields/professions; two, engaging in the implementation of voluntary affirmative efforts to enhance minority participation in higher education through scholarships that consider race as one factor in making the award; and three, using "other-race" scholarships at majority and minority institutions to effect desegregation pursuant to a court order, consent decree, or administrative order/agreement.

The Supreme Court was quite clear on the central point here—the use of race as one factor. Justice Powell, writing for the court said:

"The experience of other university admissions programs, which take race into account in achieving the educational diversity valued by the First Amendment, demonstrates that the assignment of a fixed number of places to a minority group is not a necessary means toward that end . . .

"In such an admissions program, race or ethnic background may be deemed a "plus" in a particular applicant's file, yet it does not insulate the individual from comparison with all other candidates for the available seats.

". . . In short, an admissions program operated in this way is flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according to the same weight. Indeed the weight attributed to a particular quality may vary from year to year depending upon the 'mix' both of the student body and the applicants for the incoming class." (438 U.S. 265 316–18)

The Supreme Court's Croson decision is specifically focused on the ability of local governments to emulate Congress in enacting race, national origin or gender-based "set-asides" and not to academic institutions, public or private. Even if Croson could be extended to the admissions decisions of public institutions of higher education, we believe it is wholly inapplicable to the award of scholarships or other student financial assistance.

The United Negro College Fund welcomes President Bush's decision to modify the proposed policy change announced last Wednesday by the Assistant Secretary of Education for Civil Rights. We urge the President, however, to go further and to direct the Assistant Secretary and the Attorney General to abandon their opposition to congressionally-mandated "race-specific" set asides and remedial Federal assistance programs. In addition, UNCF believes that voluntary efforts to ameliorate the present effects of past discrimination—affirmative admission and minority scholarship programs, in particular—should be encouraged and affirmed. This has been the case in the past and it should be the case for the foreseeable future.

Such a decision by the President would remove the pall cast by Assistant Secretary Williams' announcement last week and the certain "chill" place on colleges and universities who want to do the right thing. Equally important, a presidential announcement or executive order would covey to the American people the President's sincere concern about the need to encourage academic achievement among minorities and to provide financial assistance for them to attend college. Many minority students who benefit from the scholarships that would have been called into question, will not quality for assistance if the surrogates of "low income" and "educationally disadvantage" are used. To be more direct, many of the students being recruited and awarded these scholarships are academically gifted and black. To suggest that all minority students who receive scholarship or financial assistance to attend college—must do so based on "need" or "educational disadvantage" or based on race/national origin alone—is mistaken and racist. I reject the notion, advanced by the Administration, that "race alone" is ever the only consideration.

I do, however, believe that race can and should be the overriding consideration when all all factors are equal, e.g., academic qualifications, financial need or educational disadvantage. Race, after all, was the most important factor in determining the status of African-Americans in this country—it should also be the critical factor in remedying the evils that discrimination wrought on black Americans, Hispanic Americans, and Native Americans.

I will depart from my test here. If we review the situation we discovered African-Americans have the leading homicide and suicide rate. African-American males who make up somewhere between 6 to 7 percent of the general population now populate our prisons at a rate of 55 percent with predictions for the year 2000 to soaring to 80 percent.

How can we in our right and civil minds, how can we in wisdom and sagacity retreat at this point in time from minority scholarships when the social picture is so bleak and young people need encouragement, incentive and inspiration.

Thank you for your attention, Mr. Chairman, and for your vigilance over the years in the defense of minority Americans.

Our children, African-American and white American, brown and red, and the educational institutions that serve them owe you, Mr. Chairman, a great debt of gratitude.

Thank you very much.

[The prepared statement of Dr. Adib Shakir follows:]

TESTIMONY OF DR. ADIB SHAKIR, PRESIDENT
TOUGALOO COLLEGE
Before The

HOUSE COMMITTEE ON EDUCATION AND LABOR

December 19, 1990

MR. CHAIRMAN, MEMBERS OF THE COMMITTEE ON EDUCATION AND LABOR, I AM ADIB SHAKIR, PRESIDENT OF TOUGALOO COLLEGE IN TOUGALOO, MISSISSIPPI. TOUGALOO COLLEGE WAS FOUNDED IN 1869 BY THE AMERICAN MISSIONARY SOCIETY OF NEW YORK AND IS NOW AFFILIATED WITH THE CHRISTIAN CHURCH (DISCIPLES OF CHRIST) AND THE UNITED CHURCH OF CHRIST. WE OFFER THE ASSOCIATE OF ARTS IN EARLY CHILDHOOD EDUCATION, IN ADDITION TO THE BACHELOR OF ARTS DEGREE AND BACHELOR OF SCIENCE DEGREES. OUR ACADEMIC PROGRAM EMPHASIZES THE PHYSICAL AND NATURAL SCIENCES, MATHEMATICS AND COMPUTER SCIENCE. IN ADDITION, OUR SOCIAL SCIENCES PROGRAM FEATURES SOLID OFFERINGS IN POLITICAL SCIENCE AND PSYCHOLOGY. OUR UNIQUENESS AS AN ACADEMIC INSTITUTION LIES IN OUR EXTERNAL ACADEMIC PROGRAMS, INCLUDING THE AFRICAN STUDY TRAVEL PROJECT AND THE CREATIVE WRITING WORKSHOP, AS WELL AS OUR STUDENT EXCHANGE PROGRAMS WITH BROWN UNIVERSITY AND BOWDOIN COLLEGE. WE ALSO OFFER COOPERATIVE ACADEMIC PROGRAMS WITH MANY OUTSTANDING COLLEGES AND UNIVERSITIES AROUND THE COUNTRY, INCLUDING BOSTON UNIVERSITY (Early Medical School Selection Program), BROWN UNIVERSITY (Early Identification Program in Medicine), HOWARD UNIVERSITY, TUSKEGEE UNIVERSITY, GEORGIA INSTITUTE of TECHNOLOGY, UNIVERSITY of MISSISSIPPI and UNIVERSITY of WISCONSIN at Madison (Joint Engineering Degree programs).

I APPEAR BEFORE YOU TODAY ON BEHALF OF THE UNITED NEGRO COLLEGE FUND (UNCF), AND THE 41 MEMBER COLLEGE PRESIDENTS WHO SERVE THE MORE THAN 48,000 STUDENTS FROM ALMOST EVERY STATE AND THIRTY FOREIGN COUNTRIES. UNCF COLLEGES AND UNIVERSITIES ARE INTEGRATED INSTITUTIONS WHICH INCLUDE MORE THAN 1,000 NON-MINORITY STUDENTS WHO ATTEND OUR MEMBER INSTITUTIONS EACH YEAR. SINCE MOST UNCF STUDENTS COME FROM LOW INCOME FAMILIES -- ALMOST NINETY PERCENT OF OUR STUDENTS RECEIVE FINANCIAL AID -- THEY ARE HIGHLY DEPENDENT ON FEDERAL, STATE AND INSTITUTIONAL SUPPORT TO PAY THEIR COLLEGE COSTS.

I WANT TO COMMEND YOU, MR. CHAIRMAN, FOR YOUR WILLINGNESS AND DEDICATION TO HOLD THIS HEARING TO GATHER PUBLIC SUPPORT FOR CONTINUING THE VARIOUS INSTITUTIONAL MINORITY SCHOLARSHIP PROGRAMS, AND TO PROVIDE A FORUM TO EXPRESS OUR OPPOSITION TO THIS PROPOSED RETREAT FROM THE NATION'S COMMITMENT TO EQUAL OPPORTUNITY IN HIGHER EDUCATION. I AM PLEASED TO JOIN MY COLLEAGUES, BOB ATWELL OF THE AMERICAN COUNCIL ON EDUCATION (ACE) AND DICK ROSSER OF THE NATIONAL ASSOCIATION OF INDEPENDENT COLLEGES AND UNIVERSITIES (NAICU), HERE TODAY. WE WANT YOU TO KNOW THAT THE HIGHER EDUCATION COMMUNITY -

- PUBLIC AND PRIVATE, TRADITIONALLY WHITE AND HISTORICALLY BLACK -- IS UNITED IN ITS OPPOSITION TO THE INITIATIVE ANNOUNCED BY ASSISTANT SECRETARY MICHAEL L. WILLIAMS ON DECEMBER 12, 1990. FURTHER, WE ARE EQUALLY CONCERNED ABOUT THE REVISION OR "REVERSAL" ANNOUNCED YESTERDAY. WE SHARE A COMMON VIEW THAT EVERY YOUNG MAN OR WOMAN, REGARDLESS OF FAMILY INCOME, HERITAGE OR CIRCUMSTANCES, OUGHT TO HAVE THE OPPORTUNITY TO ATTEND COLLEGE. FOR MOST MINORITY STUDENTS, WHETHER THEY ARE BLACK, HISPANIC OR INDIAN, THAT MEANS PROVIDING FINANCIAL ASSISTANCE TO OVERCOME GENERATIONS OF DISCRIMINATION AGAINST THEIR PARENTS AND GRANDPARENTS IN EMPLOYMENT. THE LEGACY OF RACE AND NATIONAL ORIGIN DISCRIMINATION IN AMERICA OBLIGATES THIS NATION TO USE EVERY POSSIBLE WEAPON IN THE FIGHT TO MAKE EQUAL OPPORTUNITY IN HIGHER EDUCATION A REALITY, NOT JUST RHETORIC FOR MINORITIES IN AMERICA.

AS PRESIDENT OF TOUGALOO COLLEGE, WITH ITS 950 STUDENTS PURSUING THEIR DREAM AND THEIR FAMILY'S DREAM OF A COLLEGE EDUCATION, I WAS SHOCKED TO LEARN LAST WEEK THAT THE DEPARTMENT OF EDUCATION PLANNED TO EMBRACE A POLICY WHICH WOULD ELIMINATE SCHOLARSHIPS FOR MINORITIES BECAUSE THEY DISCRIMINATE AGAINST NON-MINORITY STUDENTS. MY COLLEAGUES IN UNCF AND I WERE OUTRAGED THAT A RELATIVELY INEXPERIENCED PRESIDENTIAL APPOINTEE WOULD PROPOSE THE REVERSAL OF A DECADES LONG FEDERAL COMMITMENT TO EQUAL OPPORTUNITY IN HIGHER EDUCATION. TO HAVE DONE SO WITHOUT CONSULTING WITH KEY OFFICIALS IN THE DEPARTMENT OF EDUCATION -- NOT TO MENTION ANYONE AT THE WHITE HOUSE -- RAISES A CONCERN ABOUT WHERE MINORITY

EDUCATION AND "CIVIL RIGHTS" ARE ON OUR NATIONAL AGENDA IN 1990!

SEVERAL THINGS ARE CLEAR. EVEN AS THE WHITE HOUSE SEEKS TO UNSCRAMBLE THE LAW AND ITS OWN POLICY IN THIS AREA; AND AS WE ASSESS THE DAMAGE ALREADY WROUGHT WHEN WE MAKE PUBLIC POLICY BY PRESS CONFERENCE; AND WE ENTRUST THE FUTURES OF THOUSANDS OF AFRICAN AMERICANS, HISPANIC AMERICANS AND NATIVE AMERICANS TO THOSE WHO PLACE POLITICS ABOVE PRINCIPLE -- WE MUST REMAIN VIGILANT AND COMMITTED.

FIRST, MR. WILLIAMS NEEDS TO REVIEW HIS HISTORY BECAUSE HE SEEMS TO HAVE FORGOTTEN THAT IT TOOK CONGRESS ALMOST THIRTY YEARS AFTER THE FIRST MORRILL ACT, TO CREATE "SEPARATE BUT UNEQUAL" HISTORICALLY BLACK LAND GRANT COLLEGES. ALMOST ONE HUNDRED YEARS LATER, BLACK AND HISPANIC YOUNGSTERS REMAIN IN LARGELY-SEGREGATED URBAN SCHOOL DISTRICTS RECEIVING BELOW QUALITY PREPARATION FOR THE ECONOMIC AND EDUCATIONAL CHALLENGES OF THE YEAR 2000 AND BEYOND. THEIR CERTIFICATES OF ATTENDANCE OFTEN RETURN TO HAUNT THEM WHEN THEY ENTER COLLEGE OR SEEK EMPLOYMENT IN OUR TECHNOLOGICAL SOCIETY.

SECOND, MR. WILLIAMS NEEDS TO REVIEW THE STATISTICAL REALITIES OF MINORITY PARTICIPATION IN HIGHER EDUCATION. NOTWITHSTANDING THE FACT THAT INCREASING NUMBERS OF AFRICAN AMERICANS ARE GRADUATING FROM HIGH SCHOOL, THEIR ENROLLED-IN-COLLEGE RATES CONTINUE TO DECLINE. ACCORDING TO ACE's EIGHTH ANNUAL STATUS REPORT ON

"MINORITIES IN HIGHER EDUCATION" BETWEEN 1976 AND 1988, THE ENROLLED IN COLLEGE RATE OF DEPENDENT, LOW-INCOME AFRICAN AMERICAN HIGH SCHOOL GRADUATES DROPPED FROM 40 PERCENT TO 30 PERCENT, WHILE THE PERCENTAGE OF LOW INCOME HISPANIC HIGH SCHOOL GRADUATES GOING ON TO COLLEGE FELL FROM 50 PERCENT TO 35 PERCENT. EVEN MORE DISTURBING IS THE FACT THAT IN 1989, THE NUMBER OF BLACK MALES 18-24 YEARS OLD WHO WERE IN PRISON, ON PAROLE OR ON PROBATION (609,690) EXCEEDED THE NUMBER OF 18-24 YEAR OLD BLACK MALES ENROLLED IN COLLEGE (436,000).

THIRD, MR. WILLIAMS APPARENTLY HAS FORGOTTEN THE ADMONITION IN "ONE-THIRD OF A NATION" REGARDING MINORITY PROGRESS IN AMERICAN SOCIETY. "America is moving backward -- not forward -- in its efforts to achieve the full participation of minority citizens in the life and prosperity of the nation....In education, employment, income, health, longevity, and other basic measures of individual and social well-being, gaps persist -- and in some cases are widening -- between members of minority groups and the majority population....If we allow these disparities to continue, the United States will suffer a compromised quality of life and a lower standard of living." "ONE-THIRD OF A NATION" MAY 1988.

IT IS APPARENT TO ME THAT THE NATION'S SUCCESS AT FULFILLING ITS DECADES LONG COMMITMENT TO ELIMINATING RACIAL AND FINANCIAL BARRIERS TO COLLEGE PARTICIPATION FOR MINORITIES REPRESENTS SOMETHING LESS THAN A COMPLETE VICTORY!

UNCF JOINS TODAY, WITH THE REST OF THE HIGHER EDUCATION COMMUNITY, IN REPUDIATING THE EFFORTS OF SOME IN THIS ADMINISTRATION TO RENEGE ON AMERICA'S PROMISE TO HER CITIZENS OF COLOR. DR. MARTIN LUTHER KING, JR. SUMMARIZED THAT PROMISE IN HIS 1963 MARCH ON WASHINGTON SPEECH AT THE LINCOLN MEMORIAL:

> "In a sense we have come to our Nation's Capital to cash a check. When the architects of our great republic wrote the magnificent words of the Constitution and the Declaration of Independence, they were signing a promissory note to which every American was to fall heir.
>
> This note was a promise that all men, yes black men as well as white men, would be guaranteed the inalienable rights of life, liberty, and the pursuit of happiness.
>
> It is obvious today that America has defaulted on this promissory note insofar as her citizens of color are concerned. Instead of honoring this sacred obligation, America has given its colored people a bad check, a check that has come back marked "insufficient funds."
>
> But we refuse to believe that the bank of justice is bankrupt. We refuse to believe that there are insufficient funds in the great vaults of opportunity of this nation. So

we have come to cash this check, a check that will give us upon demand the riches of freedom and the security of justice." "I HAVE A DREAM," Martin Luther King, Jr. 1963.

THE MAJOR QUESTION THAT ARISES FROM THE EVENTS OF LAST WEEK AND THE ANNOUNCEMENT BY ASSISTANT SECRETARY WILLIAMS WAS NOT ANSWERED BY THE PRESIDENT'S DECISION TO REVERSE THE 'CIVIL RIGHTS POLICY BY PRESS RELEASE' AFFECTING MINORITY SCHOLARSHIPS. IN FACT, THOSE OF US WHO ARE MOST CONCERNED ABOUT ASSURING THAT MINORITIES OF ALL INCOME LEVELS AND EDUCATIONAL BACKGROUNDS HAVE THE OPPORTUNITY TO ENTER AND COMPLETE COLLEGE NEED TO RE-DOUBLE OUR EFFORTS.

THE DEPARTMENT OF JUSTICE AND OTHERS IN THE BUSH ADMINISTRATION INTEND TO DESTROY AFFIRMATIVE EFFORTS TO ELIMINATE THE VESTIGES OF RACIAL SEGREGATION IN AMERICA, AND TO DISMANTLE FEDERAL EFFORTS DESIGNED TO EQUALIZE OPPORTUNITY IN AMERICA. NEWS ACCOUNTS OF THE MEETING CALLED ON MONDAY BY WHITE HOUSE CHIEF OF STAFF JOHN SUNUNU WITH ASSISTANT SECRETARY WILLIAMS MAKES IT QUITE CLEAR THAT THE DECISION WAS BASED ON POLITICAL, NOT SUBSTANTIVE GROUNDS. TUESDAY MORNING'S WASHINGTON POST INDICATED THAT BOTH THE WHITE HOUSE COUNSEL AND THE JUSTICE DEPARTMENT LAWYERS AGREED WITH WILLIAMS' INTERPRETATION OF THE CIVIL RIGHTS ACT OF 1964 AND RELEVANT COURT OPINIONS THAT " RACE-SPECIFIC" SCHOLARSHIPS ARE PROHIBITED. THE FACT THAT THE MINORITY SCHOLARSHIPS "GRENADE" IS BEING ROLLED "...BACK INTO THE EDUCATION DEPARTMENT'S BACKYARD .... WHENCE IT CAME" DOES NOT MEAN THAT WE HAVE SEEN THE LAST OF IT.

RECENT HISTORY, IN FACT, SUGGESTS THAT WE WILL CERTAINLY SEE IT AGAIN. TWICE DURING THE 101ST CONGRESS, THE BUSH ADMINISTRATION JUSTICE DEPARTMENT OPPOSED CONGRESS' EFFORTS TO PROVIDE "RACE-SPECIFIC" MINORITY SCHOLARSHIP AND LOAN ASSISTANCE FOR PERSONS ENTERING THE HEALTH PROFESSIONS (H.R. 3240/S. 1606, THE DISADVANTAGED MINORITY HEALTH IMPROVEMENT ACT) AND ENTERING THE HANDICAPPED TEACHING PROFESSION (H.R. 1013, THE EDUCATION OF THE HANDICAPPED AMENDMENTS OF 1990). IN BOTH INSTANCES, THE JUSTICE DEPARTMENT, IN LETTERS OF OPPOSITION TO SENATOR KENNEDY AND CONGRESSMAN OWENS, CITED CITY OF RICHMOND V. J.R. CROSON AS THE BASIS FOR THEIR VIEW THAT EVEN CONGRESS MAY NOT ENACT A REMEDIAL RACIAL PREFERENCE OR RACE SPECIFIC "SETASIDES" WHEN RACIALLY-NEUTRAL ALTERNATIVES ARE AVAILABLE. THIS SAME LINE OF REASONING HAS BEEN ADVANCED HERE IN SUPPORT OF THE ELIMINATION OF MINORITY SCHOLARSHIPS.

THE JUSTICE DEPARTMENT'S CONSISTENT POSITION HAS BEEN ONE OF OPPOSITION TO AFFIRMATIVE EFFORTS TO ENHANCE MINORITY ACCESS TO HIGHER EDUCATION. JUSTICE'S READING OF REGENTS OF THE UNIVERSITY OF CALIFORNIA, DAVIS V. BAKKE PRECLUDES THE CONSIDERATION OF RACE IN MAKING ADMISSIONS DECISIONS AND AID AWARD DECISIONS. THEIR READING OF CROSON, WHICH WE BELIEVE TO BE INAPPLICABLE TO FINANCIAL AID DECISIONS BY INSTITUTIONS OF HIGHER EDUCATION, IS BOTH NARROW AND INACCURATE.

THE DEPARTMENT OF JUSTICE'S AND THE DEPARTMENT OF EDUCATION'S CONSISTENTLY PRESCRIPTIVE READING OF BOTH BAKKE AND CROSON UNDERLIE THEIR MISGUIDED ATTEMPTS TO CONSTRAIN BOTH CONGRESS' AND THE HIGHER EDUCATION COMMUNITY'S EFFORTS TO REVERSE CENTURIES OF DISCRIMINATION BY IMPLEMENTING AFFIRMATIVE EFFORTS TO ENROLL AND GRADUATE MINORITY STUDENTS. WE BELIEVE THAT BAKKE PROVIDES AMPLE GUIDANCE TO COLLEGES AND UNIVERSITIES: (1) SEEKING TO PROVIDE SCHOLARSHIPS TO HIGHLY QUALIFIED MINORITY STUDENTS AS A MEANS OF DIVERSIFYING THEIR STUDENT BODY AND ENHANCING THE REPRESENTATION OF MINORITIES IN CERTAIN CAREER FIELDS/PROFESSIONS; (2) ENGAGING IN THE IMPLEMENTATION OF VOLUNTARY AFFIRMATIVE EFFORTS TO ENHANCE MINORITY PARTICIPATION IN HIGHER EDUCATION THROUGH SCHOLARSHIPS THAT CONSIDER RACE AS ONE FACTOR IN MAKING THE AWARD; AND (3) USING "OTHER-RACE" SCHOLARSHIPS AT MAJORITY AND MINORITY INSTITUTIONS TO EFFECT DESEGREGATION PURSUANT TO A COURT ORDER, CONSENT DECREE, OR ADMINISTRATIVE ORDER/AGREEMENT.

THE SUPREME COURT WAS QUITE CLEAR ON THE CENTRAL POINT HERE -- THE USE OF RACE AS ONE FACTOR. JUSTICE POWELL, WRITING FOR THE COURT SAID:

> "The experience of other university admissions programs, which take race into account in achieving the educational diversity valued by the First Amendment, demonstrates that the assignment of a fixed number of places to a minority group is not a necessary means toward that end...

> In such an admissions program, race or ethnic background may be deemed a "plus" in a particular applicant's file, yet it does not insulate the individual from comparison with all other candidates for the available seats.
>
> .....In short, an admissions program operated in this way is flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according to the same weight. Indeed the weight attributed to a particular quality may vary from year to year depending upon the "mix" both of the student body and the applicants for the incoming class." (438 U.S. 265 316-18)

THE SUPREME COURT'S CROSON DECISION IS SPECIFICALLY FOCUSED ON THE ABILITY OF LOCAL GOVERNMENTS TO EMULATE CONGRESS IN ENACTING RACE, NATIONAL ORIGIN OR GENDER-BASED "SETASIDES" AND NOT TO ACADEMIC INSTITUTIONS, PUBLIC OR PRIVATE. EVEN IF CROSON COULD BE EXTENDED TO THE ADMISSIONS DECISIONS OF PUBLIC INSTITUTIONS OF HIGHER EDUCATION, WE BELIEVE IT IS WHOLLY INAPPLICABLE TO THE AWARD OF SCHOLARSHIPS OR OTHER STUDENT FINANCIAL ASSISTANCE.

THE UNITED NEGRO COLLEGE FUND WELCOMES PRESIDENT BUSH'S DECISION TO MODIFY THE PROPOSED POLICY CHANGE ANNOUNCED LAST WEDNESDAY BY THE ASSISTANT SECRETARY OF EDUCATION FOR CIVIL RIGHTS. WE URGE THE PRESIDENT, HOWEVER, TO GO FURTHER AND TO DIRECT THE ASSISTANT SECRETARY AND THE ATTORNEY GENERAL TO ABANDON THEIR OPPOSITION TO CONGRESSIONALLY-MANDATED "RACE-SPECIFIC" SETASIDES AND REMEDIAL FEDERAL ASSISTANCE PROGRAMS. IN ADDITION, UNCF BELIEVES THAT VOLUNTARY EFFORTS TO AMELIORATE THE PRESENT EFFECTS OF PAST DISCRIMINATION -- AFFIRMATIVE ADMISSION AND MINORITY SCHOLARSHIP PROGRAMS, IN PARTICULAR -- SHOULD BE ENCOURAGED AND AFFIRMED. THIS HAS BEEN THE CASE IN THE PAST AND IT SHOULD BE THE CASE FOR THE FORESEEABLE FUTURE.

SUCH A DECISION BY THE PRESIDENT WOULD REMOVE THE PALL CAST BY ASSISTANT SECRETARY WILLIAMS' ANNOUNCEMENT LAST WEEK AND THE CERTAIN "CHILL" PLACED ON COLLEGES AND UNIVERSITIES THAT WANT TO DO THE RIGHT THING! EQUALLY IMPORTANT, A PRESIDENTIAL ANNOUNCEMENT OR EXECUTIVE ORDER WOULD CONVEY TO THE AMERICAN PEOPLE THE PRESIDENT'S SINCERE CONCERN ABOUT THE NEED TO ENCOURAGE ACADEMIC ACHIEVEMENT AMONG MINORITIES AND TO PROVIDE FINANCIAL ASSISTANCE FOR THEM TO ATTEND COLLEGE. MANY MINORITY STUDENTS WHO BENEFIT FROM THE SCHOLARSHIPS THAT WOULD HAVE BEEN CALLED INTO QUESTION, WILL NOT QUALIFY FOR ASSISTANCE IF THE SURROGATES OF "LOW INCOME" AND "EDUCATIONALLY DISADVANTAGE" ARE USED. TO BE MORE

DIRECT, MANY OF THE STUDENTS BEING RECRUITED AND AWARDED THESE SCHOLARSHIPS ARE ACADEMICALLY GIFTED AND BLACK. TO SUGGEST THAT ALL MINORITY STUDENTS WHO RECEIVE SCHOLARSHIP OR FINANCIAL ASSISTANCE TO ATTEND COLLEGE -- MUST DO SO BASED ON "NEED" OR "EDUCATIONAL DISADVANTAGE" OR BASED ON RACE/NATIONAL ORIGIN ALONE -- IS MISTAKEN AND RACIST. I REJECT THE NOTION, ADVANCED BY THE ADMINISTRATION, THAT 'RACE ALONE' IS EVER THE ONLY CONSIDERATION.

I DO, HOWEVER, BELIEVE THAT RACE CAN AND SHOULD BE THE OVERRIDING CONSIDERATION WHEN ALL OTHER FACTORS ARE EQUAL, E.G. ACADEMIC QUALIFICATIONS, FINANCIAL NEED OR EDUCATIONAL DISADVANTAGE. RACE, AFTER ALL, WAS THE MOST IMPORTANT FACTOR IN DETERMINING THE STATUS OF AFRICAN AMERICANS IN THIS COUNTRY -- IT SHOULD ALSO BE THE CRITICAL FACTOR IN REMEDYING THE EVILS THAT DISCRIMINATION WROUGHT ON BLACK AMERICANS, HISPANIC AMERICANS AND NATIVE AMERICANS.

THANK YOU FOR YOUR ATTENTION, MR. CHAIRMAN, AND FOR YOUR VIGILANCE OVER THE YEARS IN THE DEFENSE OF THE RIGHTS OF MINORITY GROUP AMERICANS THROUGHOUT THE NATION. OUR CHILDREN -- BLACK AND WHITE, BROWN AND RED -- AND THE EDUCATIONAL INSTITUTIONS THAT SERVE THEM OWE YOU A GREAT DEBT OF GRATITUDE!

United Negro College Fund, Inc.
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Founder
FREDERICK D. PATTERSON
1901 - 1988

CHRISTOPHER F. EDLEY
President and Chief Executive Officer

MICHELLE D. STENT
Vice President
Government Affairs

December 21, 1990

The President
The White House
Washington, D.C. 20500

Dear Mr. President:

I am writing on behalf of myself and the 41 member Presidents of the United Negro College Fund (UNCF). As you know, our historically black, predominantly liberal arts institutions, are located throughout the South and in Ohio and Texas. More than 48,000 students from around the Nation and thirty foreign countries are enrolled at our member institutions. Although we are viewed as all-black institutions, more than 1,000 of our students are not African American. Included among our black student population, about fifty-eight percent are black women and 42 percent are black men. The overwhelming majority of students attending our colleges are low-income and ninety percent of all UNCF students receive some form of financial aid.

Because many of these students are aid-dependent and low-income, they could not attend college without both the institutional and Federal financial assistance we provide. The UNCF member presidents, as well as the board members and officers of the College Fund, are quite concerned about the two recent announcements by the Education Department Assistant Secretary for Civil Rights affecting minority scholarships. Along with many others in the higher education community, we urge you to review and reverse Assistant Secretary Williams' first and second pronouncements in their entirety.

While some have placed great significance on the legal arguments involved, we believe the public policy issue is far more important. The Federal government's historic legacy of "separate, but equal" in higher education did not end with the Supreme Court's Brown decision in 1954, nor did its decades-old commitment to fostering equal opportunity in higher education and to eliminating financial barriers to "access" and "choice" begin

"A mind is a terrible thing to waste"

BEST COPY AVAILABLE

with the passage of the 1964 Civil Rights Act. Although discrimination has been determined to be unconstitutional and outlawed as an official policy with the sanction of law, the practice of discrimination in the economic life of the Nation, as well as in our educational institutions, continues. That fact of life leaves many African American youngsters, who disproportionately come from lower income families and thus are second-generation victims of discrimination in employment, unable to afford the rising cost of a college education. Even sadder than the economic discrimination that disproportionately affects black youngsters, is the discrimination that assigns them to inferior schools with less well-prepared teachers, second-class facilities, and insufficient books and the other tools of quality instruction. Frequently, even those with high-school diplomas are unprepared and underprepared to compete successfully in college.

Many students, however, overcome even these societal, familial and institutional barriers to achieve academically in public, private and parochial secondary schools. They are not always "educationally disadvantaged" and many -- depending on their family situation -- may not meet need-based criteria to be considered as low-income, and thus they do not qualify for Federal student aid or other need-based awards. Institutions of higher education must compete for these minority students who can afford to be selective in a competitive market. Since most of these institutions have, implicitly or explicitly, operated institutions which excluded African Americans and other racial or national origin minorities, it is entirely appropriate for these institutions to undertake affirmative efforts to enhance minority enrollment. Many in the South, like the University of Alabama and the University of Louisville, are under court order or have entered into a consent/voluntary agreement to increase minority enrollment.

The civil rights enforcement policy articulated by Assistant Secretary Williams not only will reverse our collective efforts to increase the numbers of minorities entering and completing college, but will renege on the Federal government's commitment to achieving equal opportunity in higher education. At a time when the Nation is -- moving toward the Year 2000 when its human resource needs and economic growth will be more dependent than ever on minorities -- certainly going to need every trained African, Hispanic and Native American it can find, it is both legally indefensible and morally repugnant to learn that someone sworn to uphold the law is attempting to undercut it. We were especially appalled to learn that the reversal of the decades-long commitment to equal opportunity is announced at a press conference, rather than pursued through the normal rule-making or judicial processes.

Race-conscious efforts in Federal programs have been approved by the Supreme Court of the United States in Fullilove v. Klutznick, so long as its purpose is remedial, and countenanced in Board of Regents of the University of California, Davis v. Bakke so long as race is not the sole factor in determining admission. Mr. Williams' decision will adversely affect not only the affirmative efforts of majority institutions that voluntarily seek to increase minority enrollments, but also our forty-one black private colleges which currently administer racially exclusive scholarships and UNCF which raises funds for the sole purpose of providing a college education for Black Americans.

Left unchecked, these announcements will decimate the national effort to eradicate a century of segregation in our Nation's colleges and universities, and to equalize educational opportunity in higher education. The December 18, 1990 announcement is so confused in its attempt to articulate an enforcement policy, and simply wrong as to its interpretation of the existing case law and the application of the Civil Rights Restoration Act of 1989, that we believe the entire initiative must be withdrawn and/or rescinded.

While the UNCF takes no position on the merits of the Martin Luther King, Jr. holiday issue in Arizona, we do strongly support voluntary efforts to enhance minority enrollments at majority institutions and to provide college opportunities for African Americans and all other minority and under-represented student groups. We therefore strongly oppose Assistant Secretary Williams' proposed reversal of a longstanding policy favoring the use of affirmative efforts -- through "other-race" scholarships -- to promote desegregation in higher education, and -- through the use of minority scholarships -- to enhance the enrollment of African American, Hispanic American and Native Americans at traditionally white institutions.

We believe Mr. Williams' initiative, although perhaps well-intentioned, is wide of the mark on both legal and public policy grounds. All Americans believe, as you do, that the use of education as a tool in our efforts to advance the cause of equal opportunity and full citizenship for all must remain a National goal. Erecting this new barrier, at a time when our Nation needs to educate and train every person who is able and willing to work, is wrong.

The UNCF college presidents join in urging you, in the strongest possible terms, to reverse this decision in its entirety and direct both the Department of Education and the Department of Justice cease their opposition to congressionally-mandated race-specific "set-asides" and remedial Federal assistance programs. In addition, we hope you will issue a public statement or Executive Order in support of voluntary efforts to ameliorate the present effects of past discrimination -- affirmative admission and minority scholarships, in particular -- should be encouraged and affirmed.

Sincerely,

Oswald P. Bronson, Sr.

OPB:bwe
cc: Christopher F. Edley, Sr.
Virgil Ecton
UNCF Presidents

Chairman HAWKINS. Thank you, Mr. Shakir.

I wonder if some of the staff people who are occupying seats in the audience would care to occupy some of the seats on a lower rung that ordinarily Members would be occupying so that some of those who are standing in the rear of the room might be seated.

Do we have any volunteers of staff people?

Those who have been on the payroll?

The next witness is Dr. Richard Rosser, President, National Association of Independent Colleges and Universities.

Mr. ROSSER. Thank you very much, Mr. Chairman, and members of the committee.

I am Richard F. Rosser, President of the National Association of Independent Colleges and Universities. I am very happy to be here because, unfortunately, private higher education really has become the focus of the department's second, December 18, 1990 policy explanation.

I would like my written comments entered into the record.

Chairman HAWKINS. Without objection, the prepared statement will be entered in the record.

I would also notify the other witnesses that we would be delighted to do that and then have you summarize highlights which will permit us the opportunity of questioning the witnesses and also favor the other witnesses who will come after you so that we will not be here too late tonight, I hope.

Dr. Rosser, thank you for offering that suggestion.

Mr. ROSSER. I also might note that if you find the testimony persuasive, it was prepared by Shirley Wilcher who had excellent training as a member of your staff.

Chairman HAWKINS. We want to recognize that and to thank Ms. Wilcher for continuing her professional service to the Nation and we are delighted that she is able to do so.

Mr. ROSSER. Independent colleges have been committed to access for students from all backgrounds for years and years and one of the major factors indicating that commitment is that right now this last year we gave more financial aid out of our institutional resources to all students attending our schools than did all of the Federal Government's combined, including the subsidy for the Stafford loan program.

That is our commitment in general to trying to make ourselves accessible. We have had a special commitment to try to bring in minorities.

First, we assumed it was national policy going back to civil rights acts. We saw the regulations coming out of the department and these have not been focused on.

It is important to note that there have been regulations in effect for years, which have never been changed. After Bakke there was a special directive printed in the Federal Register which showed that Bakke did not basically change the affirmative action.

Secretary Cavazos spoke about the need to increase access for minorities. It is possible for you as a legislative body to set up specific programs for minority students so we thought we really were trying to carry out the national purpose.

As a matter of fact, we have done remarkably well. We did a study a year ago, how many minorities do we actually enroll in all our institutions. We found that we now enroll the same percentage of minorities in private colleges and universities as are found in four-year public institutions and the rates of increase of minority enrollment in our schools is now higher than public institutions.

This has been because of voluntary affirmative action and that is meaningful where, of course, you have financial aid available.

Eighty-two percent of the Afro-Americans in our institutions are on financial aid. Where we are talking about shall we say a fairly expensive institution, say, a institution with tuition of $10,000 or $11,000, room and board another four or five, a total cost of $16 to $17,000, where we are dealing with a minority student with full financial need, we are supplying eight or nine thousand dollars out of that total package.

The rest comes from Federal and State grants. Federal money is declining in terms of the actual money going to individual students. One question I have been asked frequently, how many programs do you have specifically for minorities. We don't know. It was never an issue until two weeks ago when we were suddenly told that all of these programs, if specifically for minorities and regardless of the source of the money, that these were illegal.

Yesterday, we are told that it is perfectly proper to have these programs if they are given by a donor and specifically dedicated to recruiting minorities but not if the institution provides the funds.

I don't know whether you have had a chance, you must have, to read the six points which Mr. Williams enunciated yesterday.

Under Title VI, however, private universities receiving Federal funds may not fund race-exclusive scholarships with their own funds. Does this mean that State institutions can use their institutional funds, and I suggest this is happening right now.

We called the Department for a clarification. We were then told after the press conference that the world private should not have been in there. if the world "private" should not have been in there, does this mean that the Department is now saying that State institutions may not use institutional funds?

I don't know where the Department is but if it is saying that we cannot use institutional funds, this is complicated our efforts to bring in minorities into our institutions.

What is a better example of voluntary affirmative action than our decision to use these funds towards these ends. Most of the money that we now use is not from endowed funds, it is from other sources.

I wish that we had all of these programs endowed. We don't.

The idea that after a four year period we could endow all these programs rather than simply using institutional aid, that is the kind of miracle I don't expect to happen. There is a program, Young Black Scholars of Los Angeles. It is now a program which is trying to help at this point 1200 black high school seniors in Los Angeles to prepare for college.

Some 700 of these, our private colleges in California are looking at.

They have publicly announced to these black students that if they are acceptable in terms of admissions, that our private institutions will meet remaining financial need and this money can only come out of institutional funds and not endowed money.

This was declared illegal yesterday. Well, I suppose we could say, could we just get the department to follow its own regulations, which have never been changed.

Could we get the Administration to encourage the department to do this? Because, after all, these regulations are based on your legislation, and Supreme Court decisions. We just cannot have one Assistant Secretary unilaterally crippling the efforts of 1600 private colleges and universities and also I am afraid of State colleges and universities in our attempt to do everything possible to bring in minorities into our institutions.

Thank you very much.

[The prepared statement of Dr. Richard F. Rosser follows:]

National Association
of Independent
Colleges and Universities

STATEMENT

OF

RICHARD F. ROSSER, PRESIDENT
NATIONAL ASSOCIATION OF INDEPENDENT
COLLEGES AND UNIVERSITIES

ON

THE OFFICE FOR CIVIL RIGHTS,
U.S. DEPARTMENT OF EDUCATION'S
POLICY REGARDING MINORITY SCHOLARSHIPS

BEFORE THE

COMMITTEE ON EDUCATION AND LABOR
U.S. HOUSE OF REPRESENTATIVES

DECEMBER 19, 1990

naicu 122 C Street N.W. • Suite 750 • Washington D.C. 20001-2190 • 202/347-7512 • FAX 202/628-2513

Thank you, Mr. Chairman and members of the committee. My name is Richard F. Rosser, and I am president of the National Association of Independent Colleges and Universities (NAICU). I am very pleased to testify before you today on an issue that is critically important to our members: financial assistance in the form of scholarships for members of minority groups -- and women, as well.

Background

NAICU's membership includes more than 840 colleges and universities. Our membership is as diverse as the nation itself. NAICU institutions include traditional liberal arts colleges, major research universities, church- and faith-related colleges, historically black colleges and universities, women's colleges, junior colleges, and schools of law, medicine, engineering, business, and other professions. This extraordinary diversity offers students a wide selection from which to choose the type of education that will best serve their interests, needs, and aspirations.

Enrollments at independent colleges range from fewer than 100 to more than 30,000 students. While we enroll 21 percent of all students, we award 33 percent of all baccalaureate degrees, 40 percent of all master's degrees, 36 percent of all doctoral degrees, and 60 percent of all first professional degrees in fields such as law, medicine, engineering, and business.

Commitment to Access

NAICU institutions are committed to increasing the enrollment of minorities in our institutions. In 1988, the year for which the most current statistics are available, the proportion of minority students enrolled in four-year independent colleges and universities was 18.2 percent, compared with 17.8 percent in four-year state-supported institutions. Of the 18.2 percent minority enrollment in our colleges, 8.1 percent were African Americans, 6.2 percent were Hispanics, 3.5 percent were Asian Americans, and 0.3 percent were native Americans.

In order to increase the minority enrollment in our institutions, we must provide financial assistance where needed, and we do. According to the latest figures from the Department of Education, 82 percent of all African-American undergraduates attending independent colleges and universities received financial assistance, as did 72 percent of all Hispanic undergraduates, and 59 percent of all Asian-American undergraduates. In 1986, 309,000 minority students attending public and independent colleges and universities received a total of three-quarters of a billion dollars in aid from the institutions' own resources.

There are no data, to date, on the amount of aid specifically earmarked for minority students that is awarded per year on our campuses, but I firmly believe that the vast majority of independent colleges and universities provide some form of scholarship assistance for minorities. In addition, I estimate that funds awarded by private colleges are in larger amounts, compared with state colleges and universities, because our tuitions are higher on average than at state institutions.

The New OCR "Policy"

The progress we have made in increasing the enrollment of minorities was seriously undermined by the recent announcement by the Education Department's Office for Civil Rights (OCR) that our schools run the risk of violating the Civil Rights Act of 1964 if we award race-specific scholarships. In Assistant Secretary Michael L. Williams's letter of December 4 to John Junker, executive director of the Fiesta Bowl, Williams stated that "the Title VI regulation includes several provisions that prohibit recipients of ED funding from denying, restricting, or providing different or segregated financial aid or other program benefits on the basis of race, color, or national origin. . . . OCR interprets these provisions as generally prohibiting race-exclusive scholarships." The letter goes on to say that "the universities that those students attend [the University of Louisville and the University of Alabama] may not directly, or through contractual or other arrangements, assist the Fiesta Bowl in the award of those scholarships unless they are subject to a desegregation plan that mandates such scholarships."

On the heels of the justifiable outrage expressed by members of the higher education and civil rights communities, OCR reversed its controversial policy announcement, but only partially. We are now told that while "the administration fully endorses voluntary affirmative action in higher education, and encourages educational opportunities for minority and disadvantaged students. . . ED has decided that the Title VI regulations will be enforced in such a way as to permit universities receiving federal funds to administer scholarships established and funded entirely by private persons or entities where the donor restricts eligibility for such scholarships to minority students." It goes on to say that "under Title VI, however, private universities receiving federal funds may not fund race-exclusive scholarships with their own funds." See U.S. Department of Education News Release, Dec. 18, 1990.

We are relieved that the OCR has begun to modify its position regarding minority scholarship programs. It now believes that scholarships (such as those awarded by the Fiesta Bowl) that are specifically reserved for minority students are consistent with Title VI of the Civil Rights Act of 1964. However, OCR has added to the confusion about what is permissible for colleges and universities that award scholarships to minority students from all other sources. It has drawn a distinction between restricted funds and other funds available to private colleges and universities to award minority scholarships. By doing so, OCR seems to suggest that private colleges and universities may accept money from donors who designate that it be spent on minority scholarships, but they cannot use their own funds for the identical purposes. This notion is patently absurd, and has no legal foundation.

The new OCR policy also conflicts with the department's appeal to colleges and universities to find ways to enroll and retain minority students. Its endorsement of voluntary affirmative action rings hollow and effectively ties our hands, preventing us from practicing what OCR preaches.

The administration's review of the OCR policy shows that it understands the importance of increasing the number of minorities on our campuses -- hence the rapid revision of Assistant Secretary Williams's first announcement. But the revision continues to reflect a fundamental lack of knowledge about the way colleges and universities finance their student aid programs, the overwhelming majority of which use unrestricted funds. In fact, 61.5 percent of all scholarship and fellowship expenditures by both public and private institutions in 1985-86 were derived from unrestricted funds. See U.S. Department of Education, National Center for Education Statistics, "Financial Statistics of Institutions of Higher Education," 1985-86.

In reality, private colleges and universities use money from a variety of sources, including restricted scholarships (which are very few in number) and contributions from alumni and others, to provide financial aid. This aid is awarded to students based on need; talent in particular fields such as athletics, music, and science; and to promote diversity. Awarding scholarships has enabled us to enroll an increasing number of minority students who have been historically underrepresented on our campuses. Now the OCR tells us that our efforts to promote diversity have violated federal law.

This new policy comes after a decade of guidance from the federal government indicating that scholarships targeted for minorities were legal. For example, in response to a complaint filed against the Massachusetts Institute of Technology (MIT) concerning its Minority Tuition Fellowship Program, the Office for Civil Rights at the Department of Health and Human Services concluded that MIT did not violate Title VI of the Civil Rights Act of 1964 by excluding the complainant from its program. See letter of the Department of Health and Human Services to unnamed complainant, Complaint Number 01-30-2046, Sept. 30, 1981.

In its letter of findings dated September 30, 1981, OCR wrote: "The Title VI Regulations state that '. . . a recipient in administering a program may take affirmative action to overcome the effects of conditions which resulted in limited participation by persons of a particular race, color, or national origin.'" It also cited the illustrations given in the regulations regarding permissible voluntary affirmative action:

> "Even though an applicant or recipient has never used discriminatory policies, the services and benefits of the program or activity it administers may not in fact be equally available to some racial or nationality groups. In such circumstances, an applicant or recipient may properly give special consideration to race, color, or national origin to make the benefits of its program more widely available to such groups, not then being adequately served. For example, where a university is not adequately serving *members of a particular racial or nationality group* it may establish special recruitment policies to make its program better known and more readily available to such group, *and take other steps to provide that group with more adequate service*." (Emphasis added).

See also letter of R. Randolph, Acting Director, OCR, U.S. Department of Education, to Dr. Paul F. Gray, President, MIT, September 30, 1981, in which ED reached the same result.

The OCR in the Department of Education reached the same conclusion in 1982: "The [Title VI] Regulation explains that remedying the effects of past discrimination may require more than the application of a race-neutral policy and . . . that voluntary affirmative action in the absence of past discrimination may include race-conscious behavior." *See* U.S. Department of Education, Office of the Assistant Secretary for Civil Rights, letter of Burton Taylor, Director, to unnamed complainant (March 24, 1982).

To my knowledge, the OCR regulations cited in these letters of findings (34 C.F.R. Section 100.3(b)(6)(ii) and Section 100.5(i)) have not been rescinded or revised in any manner. To do so would require notice in the *Federal Register* and opportunity for the public to comment. We have seen no such notices. Thus, we must question the procedural and legal bases for the recently announced policy change that clearly conflicts with the policy embodied in the above-mentioned letter of findings.

Moreover, none of the Supreme Court decisions that may be relevant in this case support the OCR's policy reversal. See e.g., Regents of the University of California v. Bakke, 438 U.S. 265 (1978); and City of Richmond v. J.A. Croson Co., 109 S. Ct. 706 (1989). In fact, OCR found in 1983 that the Bakke decision, which was based on a controversial admissions policy at the University of California at Davis, was not controlling as to the award of financial aid. It went on to state that the use of voluntary affirmative action efforts was consistent with Bakke. See Department of Education Memorandum to Gilbert D. Roman, Regional Director, Region VIII, from Joan Standlee, Deputy Assistant Secretary for Civil Rights, regarding policy clarification re Title VI and minority fellowship programs at the University of Denver (March 22, 1983).

In 1989, OCR reportedly dismissed a complaint against the University of Colorado medical school, which awarded financial aid to minority students under the Patricia Roberts Harris Fellowships program. See Washington Post, December 15, 1990. This is a program created by Congress and administered by the Department of Education. It is ironic that the department approves of federally funded scholarships that Congress establishes for groups traditionally underrepresented in higher education, but not of privately funded efforts initiated by the colleges themselves to achieve the same goals. Surely the drafters of the Civil Rights Act of 1964 did not intend this result.

The steps that our colleges have taken and will continue to take to increase the number of underrepresented students on our campuses are entirely consistent with the nation's policy to promote equal educational opportunity for all Americans. The legislation that this committee approved in the 101st Congress exemplifies the goal of providing access to higher education for all students. For example, the Twenty-First Century Teachers Act (H.R. 4130) would award financial assistance to institutions of higher education for programs to identify, recruit, and retain students to enter the teaching profession. In this legislation, minorities are specifically earmarked for assistance. In the Excellence in Mathematics, Science and Engineering Education Act, Public Law 101-589, signed into law by President Bush on November 16, Congress stated that "women and minorities are significantly underrepresented in the fields of mathematics, science and engineering," and that its national objective was, among other things, to "substantially increase the number of women and minorities pursuing careers in mathematics, science and engineering." Title IV of the legislation is specifically targeted to encourage women and minorities to enter the math, science, and engineering professions.

You are no doubt aware of the minority and gender-based scholarships provided under the Higher Education Act of 1965 as amended, including the Patricia Roberts Harris Graduate Fellowships for financially disadvantaged women and minorities, which was funded at $17.6 million in FY 1991, and the Minority Participation in Graduate Education Program, funded at $5.9 million in FY 1991. What we are doing in higher education with our own resources is no less important. Our goal is the same -- to recruit and retain minority students and women, who have been historically underrepresented in higher education.

I have suggested in my testimony that gender-based scholarships are in jeopardy under the OCR's recent interpretation of the law. Title IX of the Education Amendments of 1972 derives from and is analogous to Title VI of the Civil Rights Act of 1964. See 20 U.S.C. Section 1681 et seq. Thus, programs established by many colleges and universities for the purpose of recruiting and retaining underrepresented women in various academic and professional fields may also be of questionable legality.

The Quota Issue

I wish to emphasize that scholarships used to recruit and retain underrepresented minorities and women are not quotas. Quotas deny access to higher education, and without a court order, may be illegal under both the Constitution and federal statutes. Minority or gender-based scholarships do not establish or constitute a barrier. While scholarships may make it easier for minority students to attend a given institution, they guarantee neither entry to nor graduation from an institution.

Conclusion

The National Association of Independent Colleges and Universities calls upon the administration to rescind totally and unequivocally the policy directive embodied in the Education Department's December 18, 1990, news release. If the administration does not exercise leadership in this issue, it will call into question virtually every financial aid program of every private college and university in the country, create chaos on our campuses, instigate a barrage of unwarranted litigation, further discourage minority students from applying to college, and exacerbate the severe shortage of educated workers that this nation will face in and beyond the year 2000.

Thank you, Mr. Chairman. I will answer any questions that you or the other members of the committee may have.

# # #

Chairman **Hawkins**. Mr. Tatel, we are glad to welcome you back again. We look forward to your testimony.

Mr. **Tatel**. Thank you, Mr. Chairman.

Mr. Chairman, and members of the committee, my name is David Tatel. I served as Director of the Office of Civil Rights from 1977 to 1979 when it was part of the Department of Health, Education and Welfare.

Mr. Chairman, I appreciate very much your kind remarks at the opening of today's hearing. I today practice law in Washington, and I would like the record to reflect that although I do advise my own clients on the issue that is before you today, I am speaking solely for myself in my somewhat amorphous capacity as a former OCR director.

I, too, have a written statement. Actually, I had several versions of this that I had to keep changing on a daily basis to reflect OCR changes, but I would like to submit a final version for the record and I will summarize it.

My statement begins with a brief summary of how OCR interpreted Title VI with respect to minority scholarships while I was there and during the period before my tenure. I then point out that after the Bakke decision, the policy was re-examined in view of that case, re-examined, I should add, on the basis of a legal opinion prepared by the Department's general counsel and a judgment was made that no changes in OCR policy were necessary.

In my view, Mr. Chairman, the Assistant Secretary's effort to alter OCR policy should be of grave concern to the Congress for two reasons. The first reason is procedural, and the other witnesses have mentioned it, as well.

The issues that are before you today are issues of enormous importance. Minority access to higher education, relations between the races, which are not getting any better in our country, are difficult and subtle questions of constitutional law.

These are issues that should not be resolved by an Assistant Secretary acting unilaterally and without consultation or fact-finding. I think it is not inappropriate to remind ourselves that ours is a government of laws, not of men, and that this kind of capricious behavior should not be tolerated in our system.

It would have been far preferable for the Assistant Secretary to have proceeded through the formal regulatory process or at least to have sought the broadest possible consultation before he took his action.

This would have allowed him to hear and consider the views of the higher education community, of civil rights organizations, of the business community and of all other concerned parties.

And most important, it would have enabled him to have learned some very important facts about this issue that OCR obviously does not now know.

How many minority scholarships are there in this country and what are their terms?

How many are funded by public funds and how many private?

What has been their impact on increasing minority enrollment?

What has been their impact on non-minority enrollment?

These are important questions and it is inconceivable to me that the Assistant Secretary would have attempted to deal with this issue without first gaining control of these facts.

The second concern is with the substance of his announcement. OCR policy until now has represented a careful balance between the national desire to increase the number of minorities in higher education without interfering with the rights of non-minorities.

This is an important balance. This is a balance which has worked successfully for over two decades. There is no evidence that I know of that minority scholarships have adversely affected the rights of non-minority and I cannot think of any legitimate reason for changing the policy now.

A change in policy is certainly not required by the Bakke and Richmond decisions and I discuss those in my statement.

Finally, Mr. Chairman, although Title VI depends very heavily on voluntary compliance and although under normal circumstances the statements of the Assistant Secretary regarding the meeting of Title VI should be given great weight, it is very important to emphasize that his recent announcements do not bind recipients of Federal funds.

The fact is that the Assistant Secretary has absolutely no authority to bind any recipients of Federal funds simply by issuing a press release.

The Assistant Secretary for OCR can act with binding effect in only one of two ways, either by initiating the formal regulatory procedures or by initiating an enforcement proceeding and prevailing before an administrative law judge and, if necessary, a Federal court.

Since OCR chose neither of these routes, the Assistant Secretary's statements should be viewed as no more than his own personal opinion as to the applicability of Title VI to minority scholarships.

In conclusion, Mr. Chairman, let me make a couple of observations about yesterday's announcement, and about the possible need for legislation.

In a city that is accustomed to a blizzard of press releases, yesterday's has to be one of the most interesting and disturbing that I have ever read. Two examples—paragraph two says that universities can continue to use—can continue minority scholarship programs with privately donated money.

In my view, that policy is directly contrary to the Civil Rights Restoration Act, which the Congress passed several years ago to overrule the Grove City decision.

Paragraph 3 is even more interesting.

Paragraph 3 is the paragraph which apparently says that OCR has no administrative enforcement authority where an issue is controlled by a court decision interpreting the Constitution.

Now, if that is what it, in fact, means, the consequences of that are dramatic. It means, for example, that OCR no longer has jurisdiction over school desegregation cases, which are also controlled by Supreme Court decisions interpreting the Constitution.

It means, in fact, that the very purpose of OCR and of Title VI, which was passed by Congress to provide an administrative enforcement mechanism for implementing the Supreme Court's interpretation of the Constitution, has been completely erased by this announcement.

I don't even understand how the Assistant Secretary will implement his own strategy that he announced several days earlier if this is, in fact, the policy that guides OCR for a number of his priorities, such as the over-identification of minority children in special education and racial harassment on campus are also controlled by decisions of the Supreme Court interpreting the Constitution.

Finally, the question will naturally arise what should Congress do. Initially, Congress should wait.

OCR has already changed its position once. It may change it again, and we should wait, Congress should wait to see what OCR's final policy is in this area. It may well be, however, that in the end legislation of some kind will be necessary.

It may be necessary to clarify the tremendous confusion that the Administration has already created.

It may be necessary to help avoid a great deal of what will be expensive and divisive litigation and it may be necessary in view of the increasing conservative views of the courts to preserve minority scholarships altogether.

If it does become necessary for Congress to act, however, it is extremely important that Congress act only after the kind of careful and thorough fact-finding that the Department of Education failed to do.

There needs to be a thorough record about the role of minority scholarships, about their impact on increasing minority enrollment, about their impact, if any, on non-minorities so that whatever legislation Congress does pass will be fully justified, carefully targetted to solving the problem and as defensible as possible if it is challenged in courts.

Thank you for the opportunity to be here today. I would be glad to join the panel in answering any questions you might have.

[The prepared statement of David S. Tatel follows:]

STATEMENT OF DAVID S. TATEL BEFORE THE HOUSE COMMITTEE ON EDUCATION AND LABOR

DECEMBER 19, 1990

Mr. Chairman, members of the Committee, my name is David S. Tatel. I served as Director of the Office for Civil Rights from 1977 to 1979 when it was part of the U.S. Department of Health, Education & Welfare. I now practice law in Washington, D.C.

I appreciate this opportunity to share with the Committee my views about the legality of minority scholarship programs. Minority scholarships have played an important role in increasing minority participation in higher education. The possibility that they might be viewed as inconsistent with Title VI of the Civil Rights Act of 1964 should be of grave concern to everyone.

Until the week before last, the Department of Education, and the Department of Health, Education & Welfare before it, had interpreted Title VI and its implementing regulations to permit minority scholarship programs, either as part of court-ordered or department-approved desegregation plans or as legitimate efforts to increase the number of underrepresented minorities on campus and to promote diversity. As long ago as 1972, OCR indicated that "[s]tudent financial aid programs based on race or national origin may be consistent with Title VI if the purpose of such aid is to overcome the effects of past discrimination." Summary of Requirements of Title VI of the Civil Rights Act of 1964 for Institutions of Higher Education. In 1979 OCR reviewed its interpretation of Title VI in light of the Supreme Court's decision in Bakke and expressed no change in its view of minority financial aid programs. See 44 Fed. Reg. 53509 (1979).

The Assistant Secretary's effort to alter this long-standing policy should be of great concern to the Congress for two important reasons. The first is procedural. The question of the legality of minority scholarships raises issues of enormous importance: minority access to higher education; relations between the races, which are not getting any better in our country; and subtle questions of constitutional law. Questions like these should not be resolved by an Assistant Secretary of Education acting unilaterally and without any consultation or fact-finding.

It is unfortunate that the Assistant Secretary chose to proceed in this manner. Because of the importance of minority scholarships and their long-standing legality, it would have been far preferable for OCR to have proceeded through the formal regulatory process, or at least to have sought public comment before making its announcements. This would have enabled OCR to hear and consider the views of the university community, of civil rights organizations, and of the business community. It would also have enabled OCR to learn some very important facts about minority scholarships that the agency clearly does not now know, such as the number and scope of such scholarships, the extent to which such scholarships are funded by private donors, the impact such scholarships have had on minority enrollments and higher education, the proportion of total scholarship aid that minority scholarships represent, and the impact, if any, that minority scholarship programs have had on non-minority students. It is, to say the least, disappointing that OCR attempted to deal with this important issue without such information.

The second concern is with the substance of the Assistant Secretary's announcements. Minority scholarships have played an important role in increasing minority access to higher education, and they have done so without any evidence that they have had an adverse effect on non-minority students. This is an important balance, it has worked for over two decades, and there does not appear to be any legitimate reason for changing it now.

Regents of the University of California v. Bakke, 438 U.S. 265 (1978), and City of Richmond v. J.A. Croson Co., 109 S. Ct. 706 (1989), certainly do not require a change in policy. Bakke involved an admissions program, not scholarships, and as I indicated above, OCR examined its policies in view of Bakke shortly after the decision was announced by the Supreme Court, and decided that no change was necessary.

In Richmond v. Croson, the Supreme Court invalidated Richmond's minority set-aside program because the record contained insufficient evidence of past discrimination to justify a race-conscious contracting program. Minority scholarships, in contrast, are part of a university's effort to promote diversity, an objective that the Supreme Court held in Bakke is a constitutionally acceptable justification for taking race into account in the admissions process. Only a few months ago, the Supreme Court reaffirmed the importance of diversity to institutions of higher education. Metro Broadcasting, Inc. v. Federal Communications Commission, 110 S. Ct. 2997, 3010 (1990).

Moreover, the impact of a minority scholarship program on non-minorities is significantly less and materially different than the impact on non-minorities of the set-aside programs involved in both Richmond and Bakke. Even in those cases where universities shift modest amounts of existing scholarship funds to minority scholarship programs, the impact on non-minority students is slight compared to the benefit the university realizes in terms of promoting diversity.

The Assistant Secretary's announcements are particularly unfortunate because they will, if adopted, inevitably reduce the amount of scholarship aid available to minority students. At a time when colleges and universities need minority participation more than ever before, this is a result that the nation cannot and should not tolerate.

Finally, although Title VI depends heavily on voluntary compliance, and although the Assistant Secretary's views as to the meaning of Title VI should normally be given great weight, it is important to emphasize that the Assistant Secretary's announcements, in and of themselves, are not binding on recipients of federal funds, particularly since he first announced that Title VI meant one thing and then yesterday announced it meant something quite different. I mention this because of the many reports in the press following his first announcement that university administrators were considering abandoning minority scholarship programs. Indeed, one OCR employee was quoted last week as saying: "We think that most institutions . . . will comply with the law if we tell them what it is." (Education Daily, December 14, 1990).

OCR has no authority to "tell" anyone that some minority scholarships are now suddenly illegal simply by making an announcement. OCR can bind recipients of federal funds in only two ways: either by formal regulation, which involves publishing a Notice of Proposed Rulemaking and inviting public comment; or by initiating formal fund termination proceedings and prevailing before an Administrative Law Judge and, if necessary, a federal court. Since OCR has used neither of these procedures, its announcements should be viewed by recipients of federal funds as no more than the Assistant Secretary's opinion as to how Title VI applies to minority scholarships.

Chairman **Hawkins**. Thank you, Mr. Tatel.

The Chair will not use the five-minute rule, but I hope the Members will accommodate each other by confining their questions as much as possible to that rule. The Chair will try to set the example.

Mr. Atwell, it is my understanding of the new policy that a college cannot use its own money but can administer money from outside sources for minority scholarships. The policy assumes that individuals or agencies operating scholarship programs are delegated to separate such funds.

I am wondering about the auditing and the oversight burden in the compliance with such a policy and trying to administer a financial aid program under the policy which was stated yesterday.

Mr. **Atwell**. I suggested, Mr. Chairman, that the distinction which Mr. Williams is attempting to draw in point 2 which was referred to by Mr. Tatel, that is a distinction I suggested without a difference; when funds come into an institution, they become the institution's funds.

As Mr. Rosser and I testified, most of the funds that are used for minority-specific scholarships are the funds of the institution in every sense of the word, their own funds, tuition and unrestricted gifts and things of that sort.

So I think that we are into a thicket here. It is at least confusing and certainly very damaging.

Chairman **Hawkins**. Secondly, it appears that technical assistance is going to be offered during a four-year period instead of a definitive policy or interpretation of the law. Is that your interpretation?

Mr. **Atwell**. Mr. Chairman, I haven't the vaguest idea.

Chairman **Hawkins**. How do you provide technical assistance if you don't have a clear-cut policy?

Mr. **Atwell**. You are right. I haven't the vaguest idea what technical assistance means in this instance.

Chairman **Hawkins**. If it is the advice given in the last two weeks, it is going to be conflicting advice that jeopardizes institutions and student assistance.

Mr. **Atwell**. All yesterday's statement did was confuse things even further and offer a four-year transition period to whatever regulations may be issued. It was more confusing and in many respects a step backward.

Chairman **Hawkins**. Thank you.

Mr. Coleman.

Mr. **Coleman**. No one would argue the point here today that we don't need additional minority representation on campus, that diversification is an appropriate concern for all of us, and that we have written much legislation to try to increase underrepresented minorities on our college campuses.

From the general to the specific, members of the panel, I want to ask the following question. If you don't agree with this statement, so state and clarify.

Do you believe that the Constitution permits race-based scholarships as the sole criteria for recipients receiving said funds? As a general statement, is that permitted by the Constitution? If anybody disagrees with that, they should say so now.

Hearing silence, then I will go a step further. Do you want me——

Mr. **Rosser**. Are you saying that according to current interpretation, et cetera, or what?

Mr. **Coleman**. No, your interpretation of the Constitution.

Mr. **Rosser**. It seems to me there are a few links. I would say as the law is currently interpreted, and we have no indication to the contrary except for this one change by one individual, that this is perfectly acceptable and is deemed desirable, voluntary affirmative action is deemed desirable at this point in time.

We all hope that we will get to the juncture in the history of this country where this will no longer be necessary, but at this time we deem it essential.

Mr. **Shakir**. I would echo the same. We have to understand that the need for the existence of the scholarships are based on the history that created a situation of inequity that still affects minorities, so it does become I think a very necessary and affirmative act that certainly is in accord with the spirit of the pursuit of freedom, justice and equality, particularly when there have been historical occurrences and events that have precipitated the situation that necessitated the need for some kind of affirmative position to rectify historical injustices.

Mr. **Coleman**. In both your answers, you were assuming that the racially restricted scholarship was restricted to blacks, minorities, or minority members specifically.

I guess the converse of that is the next question I have for you. If it is constitutional to make scholarships to race based because of prior discrimination for purposes of trying to create more representation now, do you not feel it is constitutional if those scholarships were specifically set up for, say, a majority group such as white men?

Mr. **Tatel**. The reason why public and private institutions of higher education have the constitutional authority to operate minority scholarship programs stems from their obligation and right under the First Amendment to promote diversity on campus. That flows from Justice Powell's decision in Bakke and it was restated as recently as last year in the Metro Broadcasting case. That means that race-sensitive scholarship programs, minority scholarship programs are justified if their purpose is to promote diversity.

A scholarship program for whites on a white campus would not promote diversity. One on a predominantly black campus would.

Mr. **Coleman**. The crux of the specific issue here is the makeup of the particular college in question. But as somewhat of an academic question, Mr. Tatel, do you believe that a person could set up a scholarship program acting as an individual source or corporation and not limit it to a particular college campus, but just claim that they want to set it up for a particular group that might be a majority or might be a minority. Is this illegal or unconstitutional or would that person lose his IRS tax-exempt status?

Mr. **Tatel**. I am not a tax lawyer, but there may well be tax consequences to it. The Bob Jones, as you know, controversy was over just that. It was not a program for funding scholarships for whites, but it was a segregated white academy. I assume the same policy would apply.

The point here is that a certain degree of race-sensitive decision making has been tolerated by the courts in order for universities to fulfill their own constitutional authority to promote diversity on campus, and that is why programs of these kinds have been approved by OCR for many, many years.

Mr. COLEMAN. I appreciate that. My question is not whether colleges are able to administer it. The question is setting it up.

In law school we had a case where you could not restrict who you sold your properties to. Theoretically you could sell a piece of property and set up a trust that would be restricted to race-based scholarships. How do you determine whether you can or cannot set up a scholarship even before it is administered by a college, especially when this money is generated from outside, not from internal sources.

Mr. ATWELL. We are saying quite the reverse, Mr. Coleman.

Mr. COLEMAN. People give schools money——

Mr. ATWELL. Most of this is funded by the institution's own funds generated through tuition and gifts.

Mr. COLEMAN. Individuals who wanted to do that on their own, you are not referring to today?

Mr. ATWELL. That appears to be okay according to yesterday's statement.

Mr. COLEMAN. In your opinion, it is okay?

Mr. ATWELL. In my opinion, it is okay, certainly.

Chairman HAWKINS. The timer will be operating to help guide the Members.

Mr. Hayes.

Mr. HAYES. Thank you, Mr. Chairman.

I don't really have but one question I want to raise about the entire package. Your testimony has been excellent, all of you. I think you are right on target.

I am reaching the point where I am almost vicious about what I see happening to us as relates to education. When I say vicious, it is no accident to me that our kids are being deprived of an opportunity to really be educated and fit into this society of ours.

The Secretary of Education, Lauro Cavazos, a minority—I will be blunt with you—did not represent minority concerns. He has moved on and is going to do something else. However, Cavazos used an African-American to come out and enunciate a policy that may not necessarily be his own. I believe that Michael Williams happened to be dancing to the tune, so to speak.

I don't separate this from the position that this Administration has in relation to the Civil Rights Act and the veto of the Civil Rights Act because I think it is tied in. You talk about quotas and they go all the way back to reverse discrimination and this kind of stuff.

I remember marching in Jackson, Mississippi with Martin Luther King. I was there a week before Medgar Evers was murdered. I see now they are going out after the fellow to try him again in the Evers' case. But the thing that is really disturbing to me and the question I want to put to you all is what can we do to counter these sentiments. I was a leader of a labor organization who dared to go down to Mississippi and march. Barnett was governor of the State of Mississippi.

What can we do about it as legislators to stop what I see as going back to the times that we fought against to try to eliminate discrimination in education, in all facets of life and sort of make democracy work?

Minority kids cannot get into some of these institutions without help. When you have got a state like Maine, the University of Illinois where they have an enrollment of almost 30,000 students and less than 2 percent of them are African-Americans and the tuition is so high and the parents don't have the money, doesn't government have a responsibility? What can we do about it?

This is the thing that bothers me. What can we do together, you as educators? One thing you can stop doing, inviting some of the people who you know are not for the kind of programs we are talking about to come on these campuses and address your student bodies. You know they are leading them in the wrong direction.

I think we need to put more pressure on people to help us and what specifically can we do together?

Mr. **Shakir**. Congressman, I believe first of all that there are a couple of things that are important as relates to issues of clarity and specificity about what has happened over the last 27 years.

You reference the fact that Mr. Beckwith was just arrested yesterday. I think there is an assumption that the last 27 years have in the minds of some people have in fact eradicated all vestiges of any racism in this nation. I think that is fundamentally incorrect, and I think that is a position we have to be public about.

When you examine what is happening with African-Americans specifically and minority populations in general, statistics suggest that the challenge is a greater challenge today than 27 years ago. It is interesting to note, for example, that this generation of African-American youth is the first generation who will not excel or exceed the accomplishments of their parents.

We notice the establishment of a permanent underclass in society for the first time where there is economic as well as social and educational incarceration occurring. what has happened is there is an effort I feel on the part of some who are not imbued and totally engulfed in the spirit of bringing equality to this Nation to retreat under the guise of technical and sophisticated outs that have nothing to do with the social or educational trends in this Nation and nothing to do with taking an affirmative stance as to what is necessary to encourage diversity.

I think the Congress has a responsibility to in fact ensure and enhance and encourage diversity through positive affirmative action policies and rules and regulations and through race-specific situations that rectify historical injustices. I find it so interesting that if we look back historically and we look at what created the situation, race was the question, was the issue that created the problem in this Nation from 1619 to 1865 with the enslavements of African-Americans, yet we somehow feel that that period of time can be quickly eradicated with actions that have occurred since 1963.

I think we are just being naive at best about what it takes to generate diversity and equality in this nation.

Mr. **Rosser**. One of the problems clearly in the last several weeks was just the absence of understanding in the department and perhaps somewhere else about what the implications were, and secondly, how important these programs have been in truly increasing minority representation in our colleges and universities.

I suggest that one thing, Mr. Chairman, you may want to do is to direct an in-depth study of this so we can begin to think how we can do even better than we are in helping minorities get into institutions of higher education. There is obviously a lot of misinformation concerning this.

Mr. ATWELL. The committee could ask the Department of Education to return to the situation which pertained prior to December 4th, and if it wishes to change the policy to have fact-finding, analysis, consultations and hearings to proceed in an orderly fashion if it wishes to make changes.

Chairman HAWKINS. We will certainly invite them to come before the committee next session. I am sure Chairman Ford will do that. We hope that when they are requested to come before the committee that they will do so.

Mr. HAYES. The committee does not have subpoena power.

Chairman HAWKINS. We do. This being my last meeting, I didn't think it was possible to get all the Members of the committee together, which is required. I am appreciative that some of you responded today, more than I thought. I thought we would only have two or three Members. That would not be sufficient to exercise subpoena power, but certainly a subpoena is available to the committee and we may have to use it soon.

I will be watching the committee from the outside next year.

Mr. Petri.

Mr. PETRI. Thank you, Mr. Chairman.

I have just a few questions, and I think maybe Mr. Tatel could respond, or one of the others if anyone wants to.

I appreciate your testimony very much and I think it puts this all in context, including the procedural implications of what has happened or really hasn't happened if what you said was true—that this is a press release by an Under Secretary and nothing more, except perhaps the Department of Education's examination of the rules under which a press release may be issued by an Under Secretary.

As I understand it, you said this is a letter and a press release by an Under Secretary and does not affect the rules for any other scholarship or university or educational institution in this country. This is not the procedure that is required for a broad-based policy change and there has in fact been no policy change, is that correct?

Mr. TATEL. I was distinguishing, Congressman, between what could be binding in colleges and universities and what was a statement of OCR more or less law enforcement strategy.

The reason I made the point is that there were many, many reports in the press of college and university presidents considering abandoning their scholarship programs. And I think it is important that they understand that what has happened so far does not require that.

The only way OCR can require that is by either issuing an enforceable regulation, which it has not done, regulations which by law must be signed by the President although the President has delegated that authority to the Attorney General, or by starting an administrative proceeding. Either one of those would be binding.

Short of that, what the Assistant Secretary's announcement represents presumably are his views about his law enforcement strategy. He has told us that he doesn't intend to enforce it for four years, but presumably when four years is up, he will conduct compliance reviews and attempt to terminate funds from universities who he feels operate like that. It is at that point the process becomes binding on universities.

Mr. PETRI. This case arose because the organizers of a scholarship to be funded by the pros from a football game asked for some advice as to how they could organize it, is that correct?

Mr. TATEL. No, no one asked for any advice. What happened was that in order—the Fiesta Bowl, in order to entice the two universities to come to Arizona, notwithstanding the state's rejection of the Martin Luther King holiday, offered a $100,000 minority scholarship program to each institution.

As far as I know, no advice was asked from anyone. The Office of Civil Rights on its own sent a letter advising them that such a scholarship could not be accepted by these two institutions.

What we have read in the press indicates that this issue of what types of minority scholarships are lawful and what aren't has been percolating up through the agency for several months.

I know what I have read in the newspapers, and that was apparently an investigation of scholarship programs operated by two universities in Florida, and maybe there are some others. Those are still in process, but the Fiesta Bowl scholarships are apparently what precipitated the letter and this entire flap.

Mr. PETRI. Another area related to this; you emphasized very strongly how it is proper to vigorously promote diversity in education to ensure access for underrepresented groups in our society.

That does seem to be a laudatory and important objective, but isn't there a difference between promoting diversity in education and in recognizing need among members of various groups for the purpose of awarding scholarships? If you have a diverse group because you have favored African-Americans and Mexican Americans and a variety of other groups in education, and now you are giving a scholarship, why would you give it to a wealthy minority as opposed to a poor non-minority?

Mr. SHAKIR. This is the point that I attempted to make in my testimony when I indicated that I felt that race should be the overriding issue and it has to do again, I think, with the question of not only diversity, but the question of history.

It is no question that the inequities that we are struggling with and that we are attempting to rectify in 1990 were facilitated based on actions that were taken from race.

From 1619 to 1865, whether you were fat or skinny, tall or short, rich or poor, if you were black, you were a slave.

Race was the overriding issue.

That subsequently and in other efforts of inequity, in other cases of oppression as relates to the Indian and Hispanic community, we saw it was the overriding issue.

Just because an African-American student may be wealthy does not assure that that African-American student will indeed attend a school where African-Americans have not historically attended.

So you have to be aggressive in that process to recruit that individual and I think that race does become the overriding factor in that regard.

Mr. **Rosser**. If I could add to the question about the significance of the particular decision, sometimes we overestimate the impact of what we say in Washington.

This is a case where I think it would be a terrible danger to underestimate the impact of this across the country.

We have presidents of colleges and universities right now wanting to know what should I do, should I cancel this program, just forget our efforts at this point in time?

They don't know and you can well imagine that if they go to their legal counsel what they will be told.

I wouldn't do anything that legal counsel would say, given the uncertainty of the situation.

Don't do it. Try to raise money for an endowment, but they might say I am not even sure whether that will be legal, it wasn't two weeks ago.

Another important factor is the impact on public opinion particularly on the parents of minority students, those families.

Here we had efforts for a number of years to them and to assure them that they were wanted at our institutions and now they are told, maybe that just isn't going to be the case anymore.

This could really set back the efforts, I think to encourage minority students to attend colleges and universities all over the country.

Chairman **Hawkins**. Mr. Mfume?

Mr. **Mfume**. Thank you very much, Mr. Chairman.

I want to also thank the members of the panel for their testimony this morning, for being here and for helping to clarify a very confusing and evolving set of public policies.

There is a phrase that I grew up with as a child that did not gain a lot of meaning until I got older that said, "the hurrieder I go, the behinder I get."

Many of us who have worked as I have, as an individual, as a Member of Congress, as a member of a board of regents of a historically black college year after year for the development and administration of scholarship funds for minorities feel violated by what has taken place in the last seven or eight days.

Someone mentioned earlier the Constitution.

Let me mention the Declaration of Independence, a phrase that oftentimes is politely referred to, but not often upheld.

That is that "We hold these truths to be self-evident that all men are created equal and that they are endowed by their creator with certain inalienable rights, and among those shall be life, liberty and the pursuit of happiness."

There is still in this Nation millions of people of African-American and Asian and Mexican persuasions who because of the color of their skin have suffered, endured and survived despite those words.

After centuries of slavery, oppression, deprivation, and denial—their pursuit of happiness got side tracked.

So in an attempt to correct past injustice, people in their own way have realized that we have got to find a way as a Nation to do what we have the capacity to do, and that is to bring all boats up with the same tide.

Yet, as a student, I recall I had to read the Supreme Court decision of 1896 that said it is okay to be separate and unequal in this country. Later, *Brown* v. *Board of Topeka, Kansas* in 1954, a unanimous consent Supreme Court decision that said no, we can't proceed as a Nation in that way, then the Bakke ruling in 1978 and now in 1990 the Michael Williams decision.

I am a bit lost and I feel violated.

This four-year transition period that has been offered by the Department of Education in its so-called clarification yesterday for schools to bring their practices into compliance really creates a new stigma.

The stigma is around minority scholarships and that has made them in many respects the orphans of educational policy and like orphans we all feel sorry for them, but we do very little.

The sad irony is what Mr. Atwell referred to earlier, that the institutions that will be most affected by the Michael Williams policy are those who already are having the greatest difficulty attracting and retaining minority students.

So against that backdrop, we are now faced with an Assistant Secretary of Education who operates as a free agent, who snubs his nose at the American public, at our congressional request to come and to help bring further clarifications to a very confusing and ever evolving day-to-day state of policy development within that Department.

It is a ship without a rudder, moving aimlessly, and it does not, it does not help any of us to be able to understand and not correct that which is wrong.

I wanted to take a moment to ramble because I feel very strongly about this.

I, like many of you, am still groping for answers.

Let me just ask a question of the panel that maybe you can answer and maybe you cannot.

I hoped to ask this of Mr. Williams today.

That is, will this new policy, Michael Williams II, affect scholarships that are based on a person's gender or their religious affiliation or their national origin?

Should Jewish students be concerned? Should women students be concerned?

If so, how do we go about correcting it?

I will leave that before the panel and let me say one other thing. I would hope Mr. Williams, if you are listening or watching, that you will do the right thing and resign your position as Assistant Secretary, move out of the way, allow the Administration, the experts in this field, the Members of Congress and the educational community to develop policy as it should be developed.

Allow us all to continue unviolated into the next century.

I would yield, Mr. Chairman, and if there is a member of the committee who has some idea as to whether or not there is an effect on gender-based scholarships or scholarships for others as a result of this, if they could respond.

Mr. Rosser. It was instructive that at the press conference Mr. Williams had that he listed other questions which would need to be invested in terms of their impact on scholarships.

One was Title IX. Now does this mean that if he follows his logic that any gender-based scholarships would be illegal, in other words, calling into question men's or women's scholarships or historically men's or women's colleges or at co-ed colleges where they were trying for years to increase the representation of women.

He also listed the question of the handicapped.

I am not sure whether he meant that scholarships specifically for handicapped might be illegal and he brought in the question of age, a sweeping indication of the interest of his office at that time.

I suspect he is not quite as interested now, but just a few days ago, that was listed right on his agenda.

Mr. Mfume. Thank you.

Thank you, Mr. Chairman.

Chairman Hawkins. Did you indicate that this astounding paragraph 3 on page 2 of the December 18, 1990 policy statement, "might even erase OCR's authority over school desegration?"

Was that you, Mr. Rosser?

Mr. Rosser. I mentioned that we were told after the press conference yesterday that in paragraph 2 on page 1 of the December 18, 1990 policy that the word "private" should be stricken from the phrase "private universities receiving Federal funds."

If that is the case, it raises the very interesting question, is Mr. Williams now saying that any institutionally-based scholarships at State institutions are illegal? But, then in paragraph 3 of that same statement, he says in effect that the department will keep hands-off questions concerning funding at state institutions.

Chairman Hawkins. That is an additional thought, too.

Mr. Tatel is the one who raised the point with respect to paragraph 3. Was it you?

Mr. Tatel. Yes, it was.

Chairman Hawkins. Briefly repeat what you said with respect to paragraph 3.

Mr. Tatel. Let me say before I repeat it that I was interpreting paragraph 3. Mr. Rosser has raised an interesting point about the difference between paragraphs 2 and 3.

I assume that what paragraph 3 covers is scholarship programs operated by state or public institutions. That is what it says. If that is the case, and if his reason for not pursuing minority scholarships at those institutions, if his reason for concluding that there is no administrative remedy is the one he says here, namely that those institutions are covered by Supreme Court decisions interpreting the Constitution, that same point could be made about every school system in this country with respect to school desegregation or any other discrimination against minorities. It could also be said about higher education desegregation and in fact it could be said about every Title VI issue.

If he means what he says here, if this sentence actually does apply to public colleges and universities, it is hard for me to know why OCR needs the size staff it now has because it will have very little to do.

Chairman **Hawkins**. If Mr. Williams had come here today, no doubt he would have denied that is what he meant.

Mr. Gunderson.

Mr. **Gunderson**. Thank you, Mr. Chairman.

Let me join my colleagues in thanking all of you for your testimony. I think this is enlightening. I am not sure the conclusion is quite what I anticipated.

As I reflect on your testimonies and on the discussions that have followed, I think we have a problem and we may want to frankly credit Mr. Williams for bringing it to our attention before the reauthorization process.

I doubt there is much disagreement in this room that affirmative action in this type of a scholarship is something most of us would support and believe is necessary for diversity.

Mr. Shakir, on page 9 of your testimony you refer to the Supreme Court ruling that considers race as one factor in making the award. You say the Supreme Court was quite clear in the central point of the use of race as one factor; "I took that and then I referred back to the statements that have come from the Department of Education where Mr. Williams cited regulations that prohibit recipients from denying, restricting or providing segregated aid on the basis of race, color or national origin.

OCR has interpreted it to mean race exclusive scholarships. That seems to suggest to me that there is not all that much difference between your interpretation and Mr. Williams'. That is that both of you are saying that race can be a factor or one factor. It cannot be the sole factor or threshold for a scholarship.

Am I at least correctly stating your interpretation of present law?

Mr. **Shakir**. I think that you are correctly stating Justice Powell's interpretation of the Constitution as it relates to admissions and, possibly, to Mr. Williams' actions.

If you continue in my testimony you will note I go on that all factors being equal that race should be the overriding factor. We simply attempted to show that race was acknowledged as a factor.

What I amplified in the testimony, particularly as the testimony continues, is that race becomes the overriding factor and should be the plus factor for remedying the kinds of historical inequities that we are dealing with as well as the issue of diversity.

I think that is further clarifying.

Mr. **Gunderson**. I appreciate that but it gets to my earlier point that I think we have a problem here and I think Mr. Williams has helped us discover it. That is, that I am not sure present statutes say that race should be an overriding factor among factors. I guess I would ask each of you, do we need to look at some different statutory language in the reauthorization process to assure that the legal language follows the consensus and intent?

Mr. **Shakir**. I beg to differ. I think in the last reauthorization of the higher education in 1985 there was action taken by the Congress to indicate the support and the use of race-specific language as it relates to Title III, Part B where, in fact, I think an excellent justification and rationale was provided for the use of race-specific language.

I am sure the Chairman is familiar with that particular legislation. I think that legislation does go on to even give further clarification and support for race as an overriding factor, particularly when you are trying to restore historical inequities.

I think that question was answered in the Reauthorization Act of 1985 by the Congress.

Mr. GUNDERSON. I hate to disagree with you, but that is historical black colleges. Supreme Court rulings have made it very clear that the Congress has the authority to designate special initiatives in the area of the diversity that we are trying to promote.

That is very different than a university or a private entity having the same authority that the Supreme Court has given the Congress which leads back to my question.

Do we need to develop some legislative language that, frankly, gives other entities than the U.S. Congress that same authority to provide a race priority scholarship? I know a couple of the other gentlemen want to speak here.

Mr. ATWELL. I think it would be very helpful for the Congress to amend the Civil Rights Act to specifically authorize minority scholarships. If you have the kind of concerns you expressed——

Mr. GUNDERSON. Do you have those concerns?

Mr. ATWELL. Yes, I do.

Mr. ROSSER. Part of the action of the Office of Civil Rights over the last decade was to give the specific approval to race-based programs. The program at MIT was a classic point. If we need to clear this matter up, then let's do it by all means.

Mr. GUNDERSON. I would appreciate it if all of you within your organizations have your legal counsel spend some time looking into this and at least get back to me after the holidays. I would appreciate it.

Chairman HAWKINS. Mr. Smith?

Mr. SMITH. Thank you, Mr. Chairman.

I don't know if I have a question. There have been a lot of times in the last six weeks when I regretted that I am not going to be here for the 102d Congress. Sitting in this hearing makes me regret it a new—I need to check what I have heard from you gentlemen.

I think you have been articulate to a point. My only concern is that as we investigate today—and there will be countless other days and hours invested in trying to undo something that may not have happened and should not have happened when, in fact, we could so well use those hours and those days talking about other problems that effect our schools and our children and our work force and surrounding the issue of class and of race in this country, and of gender. So, in effect, we are fighting a rear-guard action to try to hold onto something we thought we had gained.

The cost is double. The hidden cost is that it takes our attention away from other pressing issues that should be on our plate in the months and years ahead.

I am not an attorney. Every now and then I thank God for that. I have to tell you today is one of those days. But, in fact, I am just a poor country boy from Vermont.

The 1964 Civil Rights Act was to end race discrimination. Then we ask what was intended. Could they possibly have intended to preclude voluntary actions by nonprofit individuals or organizations to promote the welfare and benefit of people who are in a minority status? Could they possibly have intended that?

No. In fact, I urge you not to make what I consider to be a mistake of spending too much time, of being too articulate. You were all excellent in that regard. But this is nonsense.

It has to be said for what it is. Let's not spend too much of our time soaring to heights of rhetorical excellence. Let's call it what it is. It is perverse in its impact. It stands the Civil Rights Act and the practices of 25 years on their heads and it is wrong. That means, I believe, that this committee must, and I hope will in the next year, bring in the appropriate people; if Mr. Williams is still in the department he would be at the head of the list.

I think it is an insult to this committee for him not to be here. We need to find out whether this policy is the camel's nose or the rest of the camel's body coming under the flap of the tent or a rogue mistake by this individual. But he has to be in here.

I hope you will tell your students to hang in there and don't back off. I hope the message from this committee will be loud and clear and across-the-board to this Administration that there is only one way to solve this and that is to role the decision back not half way but role it back the whole way and really ask whether we have to amend the Civil Rights Act.

We would not be sitting here talking about it if Mr. Williams did not put out that press release. In terms of an expenditure of our time and our energy, it is not where we ought to be putting our time and our energy. Let's hope this committee will argue for a 100 percent role-back and reversal. I pray this Administration, and I believe this President will do that. I hope we will be able to get in January the appropriate people in here.

That is not a question there but just some fury at a conversation that we should not need to have today in this country, let alone in this committee room.

Mr. SHAKIR. Congressman, if I may I would just like to thank you for that very affirmative statement and hope I speak on behalf of the panel when I say we certainly hope our message was not caught up in our eloquence and we do want to say this is nonsense, simply stated.

Mr. SMITH. That was my question, I am sure. Thank you for the answer.

Chairman HAWKINS. If this is nonsense, there is no need defending Mr. Williams or to say this committee needs to change the law. All we need to do is go back to what we were doing before December 4, 1990. It is simple to say that some positive act is needed to get minorities into college.

All we need to do is what we were doing. OCR was approving minority scholarship programs under the Reagan Administration.

Let it be said I agreed with President Reagan—in this one instance.

Gentlemen, I think that concludes this panel. We appreciate your appearing before the committee. You were the lead panel because we thought we should emphasize the education issues. We have not gotten to the civil rights issue as such and not lead off with a lot of lawyers because we did not want to engage in nitpicking over legal technicalities. We appreciate your testimony.

We will continue with panel three, Dr. Samuel Myers, President, National Association for Equal Opportunity in Higher Education, Washington, DC; Julius A. Davis, President, United States Student Association, Washington, DC; Raul Yzaguirre, President, National Council of LaRaza, Washington, DC; Jannel Byrd, Assistant Counsel, NAACP Legal Defense Fund, Washington, DC.

May I say to the witnesses that all your prepared statements in their entirety will be entered into the record. We hope you will highlight your testimony so we will have time for the members to question the witnesses. I think in that way we can expedite the hearing and not keep you too long.

Dr. Myers, I think you were the first witness. We appreciate your many years of diligent efforts in this field. We want to commend you and say that we have looked upon your record with great respect. We are delighted to have you as our witness this afternoon.

STATEMENT OF DR. SAMUEL L. MYERS, PRESIDENT, NATIONAL ASSOCIATION FOR EQUAL OPPORTUNITY IN HIGHER EDUCATION, WASHINGTON, DC; JULIUS A. DAVIS, PRESIDENT, UNITED STATES STUDENT ASSOCIATION, WASHINGTON, DC; RAUL YZAGUIRRE, PRESIDENT, NATIONAL COUNCIL OF LARAZA, WASHINGTON, DC; JANNEL BYRD, ASSISTANT COUNSEL, NAACP LEGAL DEFENSE FUND, WASHINGTON, DC

Mr. Myers. Thank you, Mr. Chairman. You have truly been the giant. We thank you for all the efforts you have made in behalf of not only blacks in higher education but higher education in general.

My name is Samuel L. Myers. I am the President of the National Association for Equal Opportunity in Higher Education (NAFEO), the membership association of 117 historically and predominantly black colleges.

I cherish my opportunity to share my views with you concerning the possible impacts of the Department of Education rulings on racial scholarship.

NAFEO has a legal issues committee and has access to some of the leading legal talents among scholars of our time. In addition, we have a Federal relations committee and an interassociational committee consisting of presidents who jealously guard their autonomy.

The events have transpired with such rapidity that there has been no time to use our communications infrastructure within NAFEO. I have, however, talked with our chairman, Frederick Humphries, who is also president of Florida A and M University.

In addition, I have sampled among our constituency. Accordingly, I believe the remarks I am about to make are in consonance with the thinking of our constituents. However, I must for the moment present these views as my own.

We were as upset and disappointed as I understand President Bush was with Assistant Secretary Williams' letter stating that scholarships targeted toward a specific race by a private donor were in violation of Title VI of the Civil Rights Act of 1964 if administered by a college, university then that institution would be in jeopardy of losing all Federal funds, if it administered the scholarships.

We welcome the Administration's modification of that decision and a statement by the President of his commitment to affirmative action. I, however, as are others, am also concerned about the unresolved ambiguity of that provision, that private institutions must not use their funds for race-specific scholarships.

We have been as dismayed as much by what was said in Secretary Williams' letter as by who said it. Now, it is not simply the physiognomy of the spokesman. Rather, it is that we expect at the level of the Assistant Secretary that I believe to be a high level position rather than a low level position that some have alluded to, but an Assistant Secretary in the Department of Education should have a broad outlook on society.

One should be cognizant of sociological and economic ramifications of a technical point of law. In our considered opinion, this ruling, if not completely reversed could have a devastating impact on blacks and other minorities in America. In a sense we are at present caught between the past and the future.

When we view history in terms of centuries, or the immediate past decade, Federal policies have directly and indirectly contributed to the educational retrogression among blacks. Projects for the future, however, based on studies that all of us know are that blacks and other minorities, others will be constituting an increasing percentage of the labor force. In order that this Nation might become more competitive and remain economically viable, more blacks and other minorities must be educated.

Unlike the 1960s, when the rationale for educating minorities was based on equity or justice, now the rationale is based on competitiveness or national self-interest.

The forecasts for the year 2000 are that one-third of the Nation will be minority. The majority of new workers entering into the labor force will be minorities. The labor force must have technical skills that require a higher education. We must have a more liberally educated population.

Left to their own resources, blacks and other minorities could ill afford the higher education essential for their own well-being and for the well-being of the Nation.

Alexander Aston, in his data on American freshman norms, points out that whereas more than one-third of the students going to historically black colleges will constitute a large percentage of black students, have estimated parental income of $20,000 or less. Only about nine percent of students attending universities in general come from families with such low incomes.

I have appendix I in which we present those data. It is well known that in spite of the poor of education, the shift from grants to loans in the 1980s adversely impaired the participation of blacks in higher education.

Social security payments, for example, to support the education of students which stood at $2 billion in 1980-1981 have phased out to zero. Specially directed aid to veterans which stood at $9 billion in 1981 has been reduced by two-thirds. Other grants that were at $135 million in 1980-1981, in 1982 dollars have have reduced in constant dollars by 55 percent down to about $6 billion.

These data have been compiled by the college board. I think I have an attachment with those data.

NAFEO itself produces some research reports. One entitled Recruitment and Retention of Black Students in Higher Education featured an article by Glenda Carter who also uses college board data. She reasons that the inability of financial aid and tuition costs impact upon the college attendance of black students.

NAFEO in its own survey of institutional members data received some replies from 67 institutions that awarded $46 million in institutional scholarships. Our position accordingly is that curtailing private or institutional scholarships will adversely affect the education of blacks and thus of the Nation. Would not the curtailment of scholarships to black students going to predominantly white institutions favorably affect the historical black colleges since students would merely transfer from predominately white to historically black colleges where tuitions are lower?

This is a question that has been posed to us by some members of the press. The answer is categorically no. The historically black colleges are an integral part of the United States of America. That which hurts blacks and which hurts America will sooner or later hurt the historically black colleges.

Indeed, the race-specific strategies not only help to remedy the past effects of discriminatory practices but they have been used to increase the flow of black students in predominately white institutions.

And less well known, but it addresses a point raised by this panel which is important, these race-specific scholarships have been used to increase the flow of white students at predominately black colleges.

Part B of Title III of the Higher Education Act help to increase the flow of educated blacks to the mainstream of our society where the real segregation continues to exist, in every policy making, manager profession in our society there is an underrepresentation of blacks. That is where segregation exists.

Now, by integrating managerial, professional positions in the broader society, race-specific remedies do not segregate, rather they help to integrate the broader society and constantly strengthen America.

I thank you.

[The prepared statement of Dr. Samuel L. Myers follows:]

TESTIMONY

by

Dr. Samuel L. Myers, President

NATIONAL ASSOCIATION FOR EQUAL OPPORTUNITY IN HIGHER EDUCATION (NAFEO)

on

WEDNESDAY, DECEMBER 19, 1990

at the

HOUSE COMMITTEE ON EDUCATION AND LABOR
FULL COMMITTEE OVERSIGHT HEARING

on

THE DEPARTMENT OF EDUCATION, OFFICE OF CIVIL RIGHTS POLICY ON STUDENT FINANCIAL ASSISTANCE

National Association For Equal Opportunity in Higher Education
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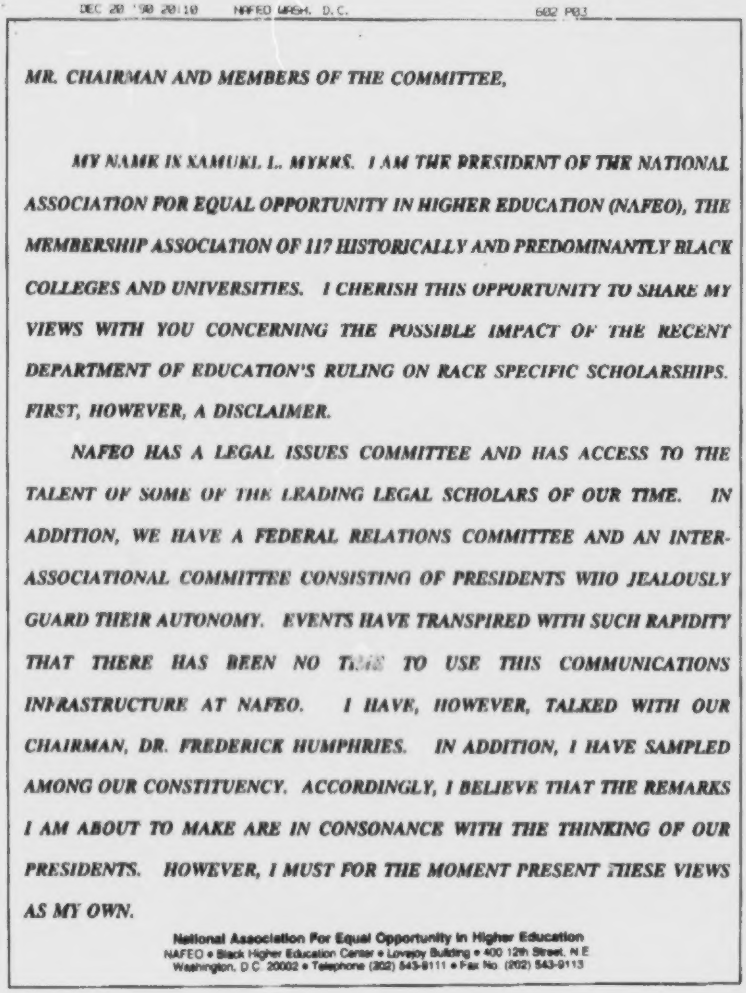

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE,

MY NAME IS SAMUEL L. MYERS. I AM THE PRESIDENT OF THE NATIONAL ASSOCIATION FOR EQUAL OPPORTUNITY IN HIGHER EDUCATION (NAFEO), THE MEMBERSHIP ASSOCIATION OF 117 HISTORICALLY AND PREDOMINANTLY BLACK COLLEGES AND UNIVERSITIES. I CHERISH THIS OPPORTUNITY TO SHARE MY VIEWS WITH YOU CONCERNING THE POSSIBLE IMPACT OF THE RECENT DEPARTMENT OF EDUCATION'S RULING ON RACE SPECIFIC SCHOLARSHIPS. FIRST, HOWEVER, A DISCLAIMER.

NAFEO HAS A LEGAL ISSUES COMMITTEE AND HAS ACCESS TO THE TALENT OF SOME OF THE LEADING LEGAL SCHOLARS OF OUR TIME. IN ADDITION, WE HAVE A FEDERAL RELATIONS COMMITTEE AND AN INTER-ASSOCIATIONAL COMMITTEE CONSISTING OF PRESIDENTS WHO JEALOUSLY GUARD THEIR AUTONOMY. EVENTS HAVE TRANSPIRED WITH SUCH RAPIDITY THAT THERE HAS BEEN NO TIME TO USE THIS COMMUNICATIONS INFRASTRUCTURE AT NAFEO. I HAVE, HOWEVER, TALKED WITH OUR CHAIRMAN, DR. FREDERICK HUMPHRIES. IN ADDITION, I HAVE SAMPLED AMONG OUR CONSTITUENCY. ACCORDINGLY, I BELIEVE THAT THE REMARKS I AM ABOUT TO MAKE ARE IN CONSONANCE WITH THE THINKING OF OUR PRESIDENTS. HOWEVER, I MUST FOR THE MOMENT PRESENT THESE VIEWS AS MY OWN.

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WE WERE AS UPSET AND DISAPPOINTED AS I UNDERSTAND WAS PRESIDENT BUSH WITH ASSISTANT SECRETARY WILLIAMS' LETTER STATING THAT SCHOLARSHIPS TARGETED TOWARD A SPECIFIC RACE BY A PRIVATE DONOR WERE IN VIOLATION OF TITLE VI OF THE CIVIL RIGHTS ACT OF 1964 IF ADMINISTERED BY A COLLEGE OR UNIVERSITY AND THAT THAT INSTITUTION WOULD BE IN JEOPARDY OF LOSING ALL OF ITS FEDERAL FUNDS SHOULD IT ADMINISTER THE SCHOLARSHIPS. WE WELCOME THE ADMINISTRATION'S MODIFICATION OF THAT DECISION AND A STATEMENT BY THE PRESIDENT OF HIS COMMITMENT TO AFFIRMATIVE ACTION. I, AS OTHERS, AM ALSO CONCERNED BY THE UNRESOLVED AMBIGUITY OF THE PROVISION THAT INSTITUTIONS RECEIVING FEDERAL FUNDS MAY ONLY USE THEIR PRIVATE FUNDS FOR RACE SPECIFIC SCHOLARSHIPS. WE HAVE BEEN AS DISMAYED AS MUCH BY WHAT WAS SAID IN SECRETARY WILLIAMS' LETTER AS BY WHO SAID IT. IT IS NOT SIMPLY THE PHYSIOGNOMY OF THE SPOKESMAN RATHER IT IS THAT WE EXPECT AT THE LEVEL OF THE ASSISTANT SECRETARY, PARTICULARLY IN THE DEPARTMENT OF EDUCATION, ONE WITH A BROAD OUTLOOK ON SOCIETY, ONE WHO IS COGNIZANT OF THE SOCIOLOGICAL AND ECONOMIC RAMIFICATIONS OF A TECHNICAL POINT OF LAW. IN OUR CONSIDERED OPINION, THIS RULING, IF NOT COMPLETELY REVERSED, COULD HAVE A DEVASTATING IMPACT ON BLACKS AND ON AMERICA.

IN A SENSE, WE ARE AT PRESENT CAUGHT BETWEEN THE PAST AND THE FUTURE. WHETHER WE VIEW HISTORY IN TERMS OF CENTURIES, DECADES OR THE PAST DECADE, FEDERAL POLICIES HAVE DIRECTLY AND INDIRECTLY CONTRIBUTED TO THE EDUCATIONAL RETROGRESSION AMONG BLACKS. HOWEVER, PROJECTIONS FOR THE FUTURE, BASED ON STUDIES THAT ALL OF US WELL KNOW, ARE THAT BLACKS AND OTHER MINORITIES WILL CONSTITUTE AN INCREASING PERCENTAGE OF THE LABOR FORCE. IN ORDER THAT THIS NATION MIGHT BECOME MORE COMPETITIVE AND REMAIN ECONOMICALLY VIABLE, MORE BLACKS AND OTHER MINORITIES MUST BE EDUCATED. UNLIKE THE 60'S, WHEN THE RATIONALE FOR EDUCATING MINORITIES WAS BASED ON EQUITY OR JUSTICE, THE RATIONALE IS NOW BASED ON COMPETITIVENESS FOR NATIONAL SELF-INTEREST. THE FORECASTS FOR THE YEAR 2000 ARE THAT:

O ONE-THIRD OF THE NATION WILL BE MINORITY,

O THE MAJORITY OF NEW WORKERS ENTERING THE LABOR FORCE WILL BE MINORITIES,

O THE LABOR FORCE MUST HAVE TECHNICAL SKILLS REQUIRING A HIGHER EDUCATION,

O WE MUST HAVE A MORE LIBERALLY EDUCATED POPULATION, AND

O LEFT TO THEIR OWN RESOURCES, BLACKS AND OTHER MINORITIES COULD ILL AFFORD THE HIGHER EDUCATION ESSENTIAL FOR THEIR OWN WELL-BEING AND THAT OF THE NATION.

ALEXANDER ASTIN, IN HIS DATA ON THE AMERICAN FRESHMAN NATIONAL NORMS, FOR EXAMPLE, POINTS OUT THAT WHEREAS MORE THAN A THIRD OF THE STUDENTS GOING TO THE HISTORICALLY BLACK COLLEGES HAVE ESTIMATED PARENTAL INCOME OF $20,000 OR LESS, ONLY ABOUT NINE PERCENT OF STUDENTS ATTENDING UNIVERSITIES IN GENERAL COME FROM FAMILIES WITH SUCH LOW INCOMES. THESE DATA ARE PRESENTED IN ATTACHMENT I.

IT IS WELL KNOWN THAT IN SPITE OF THE IMPORTANCE OF EDUCATION, THE SHIFT FROM GRANTS TO LOANS IN THE 1980'S ADVERSELY IMPAIRED THE PARTICIPATION OF BLACKS IN HIGHER EDUCATION. SOCIAL SECURITY PAYMENTS, DESIGNED TO SUPPORT THE EDUCATION OF STUDENTS, WHICH STOOD AT TWO BILLION DOLLARS IN 1980 TO 81 HAVE BEEN PHASED OUT TO ZERO. SPECIALLY DIRECTED AID TO VETERANS WHICH STOOD AT $1.9 BILLION IN 1980 TO 81 HAS BEEN REDUCED BY TWO-THIRDS. OTHER GRANTS THAT WERE AT $135 MILLION IN 1980/81 HAVE BEEN REDUCED IN CONSTANT DOLLARS BY FIFTY-FIVE PERCENT DOWN TO $66 MILLION. THESE DATA ARE COMPILED BY THE COLLEGE BOARD. (See Attachment 2).

PERIODICALLY, NAFEO PRODUCES RESEARCH REPORTS. ONE, ENTITLED RECRUITMENT AND RETENTION OF BLACK STUDENTS IN HIGHER EDUCATION, FEATURED AN ARTICLE BY GLENDA F. CARTER WHO ALSO USES COLLEGE BOARD DATA. (See Attachment 3). SHE REASONS THAT THE AVAILABILITY OF FINANCIAL AID AND TUITION COSTS IMPACTS UPON THE COLLEGE ATTENDANCE OF BLACK STUDENTS. NAFEO, IN ITS OWN SURVEY OF INSTITUTIONAL MEMBERS, RECEIVED REPLIES FROM 67 INSTITUTIONS THAT AWARDED $46 MILLION IN INSTITUTIONAL SCHOLARSHIPS. (See Attachment 4). OUR POSITION, ACCORDINGLY, IS THAT CURTAILING PRIVATE OR INSTITUTIONAL RACE SPECIFIC SCHOLARSHIPS WILL ADVERSELY AFFECT THE EDUCATION OF BLACKS AND THUS OF THE NATION.

WOULD NOT THE CURTAILMENT OF SCHOLARSHIPS TO BLACK STUDENTS GOING TO PREDOMINANTLY WHITE INSTITUTIONS FAVORABLY AFFECT THE HISTORICALLY BLACK COLLEGES SINCE STUDENTS WOULD MERELY TRANSFER FROM PREDOMINANTLY WHITE TO HISTORICALLY BLACK COLLEGES WHERE TUITIONS ARE LOWER? THE ANSWER IS A CATEGORICAL NO! THE HISTORICALLY BLACK COLLEGES ARE AN INTEGRAL PART OF THE UNITED STATES OF AMERICA. THAT WHICH HURTS BLACKS AND WHICH HURTS AMERICA WILL SOONER OR LATER HURT THE HISTORICALLY BLACK COLLEGES.

INDEED, THE RACE SPECIFIC STRATEGIES NOT ONLY HELP TO REMEDY THE PAST EFFECTS OF DISCRIMINATORY PRACTICES, BUT THEY HAVE ALSO BEEN USED TO INCREASE THE FLOW OF BLACK STUDENTS IN PREDOMINANTLY WHITE INSTITUTIONS. LESS WELL KNOWN BUT ALSO IMPORTANT, THEY HAVE BEEN USED TO INCREASE THE FLOW OF WHITE STUDENTS AT PREDOMINANTLY BLACK INSTITUTIONS. BUT, MOST IMPORTANT, RACE SPECIFIC REMEDIES, SUCH AS PART B OF TITLE III OF THE HIGHER EDUCATION ACT, ALL HELP TO INCREASE THE FLOW OF EDUCATED BLACKS INTO THE MAINSTREAM OF OUR SOCIETY WHERE THE REAL SEGREGATION CONTINUES TO LIE. BY INTEGRATING MANAGERIAL, POLICY-MAKING, AND PROFESSIONAL POSITIONS IN THE BROADER SOCIETY, RACE SPECIFIC REMEDIES DO NOT PROMOTE SEGREGATION, RATHER THEY HELP INTEGRATE THE BROADER SOCIETY AND CONCOMITANTLY STRENGTHEN AMERICA.

THANK YOU FOR THIS OPPORTUNITY TO PRESENT VIEWS ON BEHALF OF THE NATIONAL ASSOCIATION FOR EQUAL OPPORTUNITY IN HIGHER EDUCATION (NAFEO).

ATTACHMENTS

1. *Astin, Alex "The American Freshman National Norms, 1988. . Weighted National Norms for All Freshmen, Fall 1988.*

2. *Trends in Student Aid: 1980 to 1988 by Gwendolyn L. Lewis, The College Board*

3. *Carter, Glenda F. "Financial Aid and Tuition: Factors Contributing to the Decline of black Student Enrollment in Higher Education." Recruitment and Retention of Black Students in Higher Education, Washington, D.C. NAFEO, 1989*

4. *Survey of Student Financial Aid Allocations 1988 - 1989. Source: NAFEO Research Institute Staff analysis of A NAFEO 1990 Survey of Student Financial Aid at HBCUs.*

Attachment 1 to Testimony given by Dr. Samuel L. Myers, 12/19/90

WEIGHTED NATIONAL NORMS FOR ALL FRESHMEN, FALL 1988

	All Institutions	All 2-Year Colleges	All 4-Year Colleges	All Universities	Predominantly Black Colleges	2-Year Colleges		4-Year Colleges				Universities		Predominantly Black Colleges	
						Public	Private	Public	Private Nonsect.	Prot.	Catholic	Public	Private	Public	Private
Estimated Parental Income															
less than $6,000	3.7	5.6	3.3	1.9	11.6	5.7	3.3	3.8	2.2	3.4	2.5	2.1	1.5	16.3	7.7
$6,000 - $9,999	2.9	3.5	2.8	1.8	7.0	3.7	3.5	3.0	2.1	3.1	2.4	2.0	1.2	7.3	6.7
$10,000 - $14,999	5.1	6.7	4.9	3.5	9.2	6.7	6.4	5.1	4.1	5.3	4.5	3.7	2.5	9.4	9.0
$15,000 - $19,999	5.4	6.6	5.5	3.9	9.8	6.6	6.5	5.9	4.4	5.8	4.8	4.2	2.8	10.2	9.2
$20,000 - $24,999	6.9	8.1	6.9	5.4	9.2	8.1	7.9	7.1	5.8	7.7	6.6	5.7	4.0	9.1	9.4
$25,000 - $29,999	7.0	8.3	6.9	5.6	8.8	8.4	7.7	7.2	6.0	7.4	6.7	6.0	4.2	9.5	7.7
$30,000 - $34,999	9.1	10.3	9.0	7.5	8.4	10.5	8.7	9.7	7.4	9.2	8.0	7.9	6.0	8.3	8.5
$35,000 - $39,999	9.1	9.9	9.1	8.1	6.9	10.1	8.7	9.7	7.9	8.6	8.8	8.5	6.3	6.8	7.1
$40,000 - $49,999	12.4	12.5	12.6	12.1	8.6	12.7	10.8	11.7	11.0	11.6	11.6	12.7	9.5	8.4	8.9
$50,000 - $59,999	11.6	10.8	11.9	12.3	6.7	10.9	9.6	12.5	11.1	10.9	11.1	12.6	11.1	6.2	7.5
$60,000 - 74,999	10.7	7.9	11.2	11.4	7.1	7.7	9.1	11.3	11.8	10.0	11.6	13.5	13.1	5.7	9.0
$75,000 - 99,999	7.0	4.9	6.9	9.8	3.5	6.6	7.0	6.0	9.1	6.8	8.1	9.2	12.1	2.5	4.8
$100,000 - 149,999	4.8	2.7	4.6	7.5	1.8	2.4	5.0	3.1	7.9	5.1	6.6	6.5	11.6	1.2	2.6
$150,000 or more	4.3	2.1	4.3	7.2	1.4	1.6	5.7	2.0	9.2	5.1	6.8	5.3	14.0	1.0	2.0
Status of Parents															
living with each other	72.8	70.8	72.9	75.3	44.5	70.7	71.4	72.2	71.7	74.4	78.3	74.5	78.3	44.3	45.0
divorced or separated	21.8	22.2	22.1	20.7	45.3	22.1	23.1	22.6	23.3	21.0	17.2	21.5	17.9	45.2	45.6
one or both deceased	5.4	6.9	5.0	4.0	10.1	7.1	5.5	5.2	4.9	4.6	4.5	4.0	3.9	10.6	9.4
Number of Older Brothers															
none	52.8	48.4	53.9	56.4	50.9	48.5	47.8	53.5	55.6	55.7	49.4	56.6	57.4	48.5	54.9
one	30.7	33.1	30.0	29.0	28.1	33.0	33.6	30.1	30.3	29.1	30.0	29.0	28.8	28.9	26.8
two	10.3	11.2	10.2	9.6	10.5	11.1	11.7	10.1	9.5	10.8	12.5	9.6	9.5	10.8	10.0
three or more	6.1	7.4	5.9	4.7	10.4	7.5	6.9	6.3	4.6	5.3	8.1	4.8	4.3	11.8	8.2
Number of Older Sisters															
none	55.1	50.7	56.6	58.5	52.8	50.7	50.5	56.1	58.2	58.5	52.1	58.4	58.8	51.0	55.8
one	29.6	31.9	28.5	28.5	27.1	31.9	31.8	28.3	28.7	28.2	29.3	28.5	28.6	27.7	26.7
two	9.8	10.7	9.6	8.8	11.1	10.6	11.1	9.8	8.9	9.0	11.3	8.8	8.7	11.3	10.9
three or more	5.5	6.7	5.3	4.2	8.7	6.8	6.6	5.7	4.2	4.3	7.2	4.3	4.0	10.0	6.6
Number of Younger Brothers															
none	55.9	53.1	56.9	58.1	57.3	52.6	56.2	56.9	58.2	56.7	54.1	58.3	57.5	57.2	57.5
one	33.8	34.6	33.6	33.1	30.5	34.6	34.4	33.6	33.0	33.8	34.3	33.0	33.2	29.8	31.7
two	7.9	9.2	7.4	7.1	9.2	9.4	7.6	7.3	7.1	7.6	8.8	7.0	7.5	9.6	8.4
three or more	2.4	3.2	2.1	1.7	3.0	3.4	1.8	2.2	1.7	1.9	2.8	1.7	1.8	3.5	2.4
Number of Younger Sisters															
none	57.5	54.6	58.4	59.7	55.8	54.1	58.8	58.2	59.9	58.6	55.9	60.0	58.6	54.1	58.6
one	33.0	34.5	32.4	32.0	31.5	34.8	32.0	32.5	31.9	32.0	32.9	31.8	32.7	32.7	29.6
two	7.3	8.0	7.2	6.6	9.0	8.2	6.7	7.2	6.5	7.4	8.4	6.5	7.0	9.1	8.8
three or more	2.3	2.9	2.1	1.8	3.6	3.0	2.5	2.1	1.7	2.0	2.8	1.8	1.8	4.0	3.0
Twin Status															
no	98.2	98.1	98.2	98.3	97.8	98.1	98.3	98.3	98.2	98.2	98.1	98.3	98.4	98.0	97.6
yes - identical	0.7	0.9	0.7	0.6	0.7	0.9	0.8	0.7	0.7	0.6	0.8	0.6	0.6	0.5	1.0
yes - fraternal	1.1	1.0	1.1	1.1	1.5	1.0	1.0	1.1	1.1	1.2	1.2	1.1	1.0	1.6	1.4

SOURCE: Astin, Alex The American Freshman National Norms, 1989

CA: UCLA (American Council on Education)

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UPDATE

Trends in Student Aid: 1980 to 1988

Gwendolyn L. Lewis

September 1988

This report provides the most recent and complete statistics available on student aid in the 1980s, complementing the publication by Gillespie and Carlson, *Trends in Student Aid: 1963 to 1983* (New York: The College Board, 1983). It revises figures presented earlier for the 1980s and, for the first time, gives estimates for academic year 1987–88, replacing previously published updates. In addition, program coverage has been expanded by fuller reporting on assistance for minorities and on aid provided by the National Institutes of Health and the military.

More than thirty-five staff members in public and private agencies contributed the basic data, as well as their insights and expertise. Gwendolyn L. Lewis was responsible for assembling the data and preparing the report. Lawrence E. Gladieux and Janet S. Hansen furnished valuable advice and suggestions. Todd E. Hoffmann provided excellent clerical assistance.

The Washington Office of the College Board conducts research relevant to public policy issues in education. The office is located at 1717 Massachusetts Avenue, N.W., Suite 404, Washington, DC 20036. Phone (202) 332-7134.

Additional copies of this report may be ordered for $6 each from College Board Publications, Department M05, Box 886, New York, NY 10101-0886. The earlier *Trends in Student Aid: 1963 to 1983* may be ordered for $8 a copy from the same address.

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The College Board

Table 2. Aid Awarded to Postsecondary Students in Constant 1982 Dollars (in Millions)

Federally Supported Programs	1980–81	1981–82	1982–83	1983–84	1984–85	1985–86	Estimated 1986–87	Estimated 1987–88	Percent Change 80–81 to 87–88
	Academic Year								
Generally Available Aid									
Pell Grant	2,660	2,358	2,377	2,648	2,768	3,163	2,986	3,116	17.1
SEOG	410	371	337	342	341	364	347	330	− 19.5
SSIG	86	79	72	57	69	67	63	63	− 26.2
CWS	736	640	604	648	589	582	556	554	− 24.7
Perkins Loan (NDSL)	773	595	587	647	618	623	663	711	− 8.0
Income Contingent Loan								4	
GSL, PLUS, and SLS	6,913	7,407	6,584	7,183	7,856	7,838	7,893	9,393	35.9
(GSL)	(6,910)	(7,332)	(6,387)	(6,884)	(7,431)	(7,385)	(7,226)	(7,481)	
(SLS)		(16)	(77)	(137)	(201)	(235)	(401)	(1,480)	
(PLUS)	(3)	(58)	(120)	(162)	(223)	(218)	(266)	(431)	
Subtotal	11,577	11,449	10,561	11,525	12,241	12,638	12,507	14,171	22.4
Specially Directed Aid									
Social Security	2,099	2,047	721	209	32	0	0	0	− 100.0
Veterans	1,911	1,385	1,333	1,088	915	753	677	645	− 66.3
Military	227	241	265	285	304	307	316	299	32.1
Other Grants	135	112	87	62	58	60	56	60	− 55.2
Other Loans	69	111	212	250	298	330	273	195	182.0
Subtotal	4,356	3,804	2,513	1,777	1,470	1,297	1,168	1,054	− 75.8
Total Federal Aid	16,022	15,345	13,178	13,417	13,847	14,088	13,829	15,370	− 4.1
State Grant Programs	893	945	989	1,049	1,115	1,162	1,242	1,284	43.8
Institutionally Awarded Aid	2,296	2,304	2,464	2,731	2,939	3,258	3,518	3,806	65.7
Total Federal, State, and Institutional Aid	19,210	18,593	16,631	17,198	17,901	18,509	18,589	20,459	6.5

Note

Constant dollar figures are based on data in Table 1. For an explanation of constant dollar conversions, see page 13.

Source: Carter, Glenda F. "Fincial Aid and Tuition: Factors Contributing to the Decline of black Student Enrollment in Higher Education." Washington, DC: NAFEO, Recruitment and Retention of Black Students in HI ED, 1989.

TABLE 6

Cost of College Attendance—Total Available Aid and Black Student Enrollment 1980-81 to 1986-87

	Constant 1982 Dollars (Adjusted for Inflation)								
	Cost of Attendance*			Total Available Aid (in millions)			Enrollment (in millions)		
	Private University	Public University	Public Two-Year	Grants	Loans	Work	Total	Black	% Black
1980-81	5850	2697	2251	10486	7754	716	12,087	1107	9.2
1981-82	6101	2770	2274	9592	8093	640	12,331	—	
1982-83	6533	2980	2349	8372	7322	604	12,388	1101	8.9
1983-84	6869	3115	2403	8070	8040	648	12,162	—	
1984-85	7163	3210	2562	8115	8696	589	12,233	1076	8.8
1985-86	7538	3326	2669	8482	8682	582	12,300	—	
1986-87	7867	3418	2741	8452	8794	574	12,398 +	1066	8.6
% change 1980-81 to 1986-87	+ 34.5	+ 26.7	+ 21.8	− 19.4	+ 13.4	− 22.0	+2.6	-3.7	-0.6

*Cost of attendance includes tuition, fees, room and board

—Unavailable

+ Estimated

Sources: College Board, 1987, p. 11.
U.S. Department of Education, 1987
Chronicle of Higher Education, July 23, 1986

there was a 10.8 percent drop in black student enrollment between 1980 and 1984. The Omnibus Budget Reconciliation Act of 1981 brought some sweeping changes to federal student aid programs and unfavorably affected two major programs that minority students had come to rely on quite heavily—the Social Security program and the Pell Grants. Grant aid was further decreased during this period due to the reductions in Vietnam-era veteran educational benefits which were limited to use within ten years of military service (Lewis & Merisotis, 1987). During these same years (1980–1984), there were steady increases in the costs of attending college. Table 6 illustrates these patterns in college costs, available aid, and black student enrollment from 1980–81 to 1986–87. As college costs have increased and grants and work-study aid have decreased, and dependence on loans has increased, there has been a corresponding decrease in black student enrollment. Table 6, therefore, supports the reasonableness of the assertion that, indeed, the availability of financial aid and tuition costs impact upon college attendance of black students. While it is conceded that there are many reasons for going or not going to college, this paper argues from an economic standpoint emphasizing the fact that a college education is becoming more expensive and student aid has shifted its emphasis and become less appealing to lower-income individuals, a large portion of whom are black. The overall result is an erosion of the college participation rate of black students.

Alternative Sources of Financial Aid

Inflation, recession, budget deficits, and Reagan policy have all pulled funding away from higher education,

NATIONAL ASSOCIATION FOR EQUAL OPPORTUNITY IN HIGHER EDUCATION (NAFEO)

SURVEY OF STUDENT FINANCIAL AID ALLOCATIONS 1988-1989

	Program	1988-1989 Number of Institutions	Number of Students	Total Awarded	Average Award Per Student	Percent of Total
1.	Pell Grant	71	89655	$134,555,189	1500.80	29.0
2.	Supplementary Educational Opportunity Grant	72	29716	$ 24,765,610	833.40	5.3
3.	College Work-Study Program	73	32230	$ 31,317,640	971.69	6.8
4.	Guaranteed Student Loans	72	69375	$166,196,499	2395.63	36.0
5.	National Direct Student Loans	62	10628	$ 12,136,619	1141.95	2.6
6.	Institutional Scholarships	67	25887	$ 46,839,065	1809.36	10.1
7.	State Scholarships/Grants	69	28316	$ 27,678,838	977.49	6.0
8.	Veterans' Benefits	23	1279	$ 2,075,845	1623.02	0.5
9.	Other Scholarships/Grants a. b. c.	56	12998	$ 18,658,023	1435.45	4.0
10.	TOTAL STUDENTS (UNDUPLICATED) RECEIVING AID AND TOTAL AID ALLOCATED		126730	$464,223,328	3663.09	100.3

Source: NAFEO Research Institue Staff analysis of A NAFEO 1990 Survey of Student Financial Aid at HBCUs.

Mr. **Hayes**. [Presiding.] Thank you.

Mr. Yzaguirre?

Mr. **Yzaguirre**. Thank you, Mr. Chairman.

We want to thank Mr. Hawkins for his leadership in the area of civil rights and education through the years.

Mr. Chairman, I will ask that my testimony be entered into the record. I will summarize and make a few comments.

Mr. **Hayes**. We will appreciate it. Your entire statement will be made a part of this record.

Mr. **Yzaguirre**. We are the National Council of LaRaza, an umbrella organization that serves the Hispanic community. We are better known for our policy work and research in what is happening in the Hispanic community.

We are pleased to have the opportunity to provide thoughts on this very critical matter. We were as surprised as most in this room at the sudden turn of events, the sudden reversal of a longstanding policy on the race-specific scholarship programs.

Hispanics are the most undereducated minorities in this country. We have lower college participation than whites or blacks. The problem is not getting any better. It is getting worse. We have actually a lower number and lower percentage of Hispanics attending and graduating from colleges than we had, say, in 1976.

The educational gap between us and the majority community, between us and blacks, is increasing year by year. So it is very clear that what we have now is a great need.

We also understand from the reports available to us that Hispanics have a greater need for educational and financial assistance, that they have, despite the fact that they have a significantly greater poverty, they are much more dependent on loans to finance their education than other students in similar circumstances.

So we have a situation now where even the meager levels of financial aid are not reaching our community. So we have a very clear pattern. We are falling behind. We are not graduating the number of lawyers, doctors, and professionals that we need. We have a situation where we are about to become the largest minority in this country, where a larger number of our people are entering the work force.

In the next 10 years or so, some 22 percent of all job entrants in the labor force will be Hispanic. The jobs in blue collar and service industries that we used to fill are disappearing. The Nation needs our talents, our ability to work in the new job and to be competitive in a new world economy.

We also have another problem, Mr. Chairman, in that we as Hispanics have a long history of a lack of institutions. We don't have historically Hispanic colleges and universities as our brothers in the black community do. We don't have so many groups that have received large amounts of aid in the Federal Government and institutions. We are sitting in limbo.

In South Texas, as we used to have a graduating ceremony at the fourth grade, the implication was that is as far as you went. But there were no other opportunities for us to develop. So this limbo has created a situation with a predictable result that Hispanics will continue to be the most undereducated minority in this country unless something is done.

The Administration, the public policy apparatus does not seem to be willing to focus on solutions. Rather than wasting our energy talking about interesting legal aspects, we would like to see more energy focused on some of these problems and bringing solutions to them. Instead of having an Assistant Secretary going around the country delivering gratuitous opinions on existing policy, we think that nothing less than the future of our country is dependent on whether or not we can reverse this policy direction that was articulated by the Assistant Secretary.

We hope we can count on the action of this committee and its members in reversing what we think is a very egregious position articulated by the Assistant Secretary of Education.

Thank you.

[The prepared statement of Raul Yzaguirre follows:]

NCLR
NATIONAL COUNCIL OF LA RAZA

TESTIMONY FOR
OVERSIGHT HEARING
ON
DEPARTMENT OF EDUCATION
OFFICE OF CIVIL RIGHTS'
POLICY ON STUDENT FINANCIAL ASSISTANCE

Presented by

Raúl Yzaguirre
President
National Council of La Raza

December 19, 1990

NATIONAL COUNCIL OF LA RAZA
810 First Street, N.E.
Third Floor
Washington, D.C. 20002

STATEMENT OF
RAUL YZAGUIRRE
PRESIDENT
NATIONAL COUNCIL OF LA RAZA

A just and equitable society, one in which race and national origin are not determinants of opportunity, is a goal that we all hope to achieve. While important progress has been made during the last 26 years, we cannot yet claim to have accomplished this goal. Unfortunately, there is overwhelming and undeniable evidence that our society is not yet color-blind; nor is our society fully tolerant of speech accent, non-English surnames, and other national origin characteristics. Hispanics and other minorities continue to suffer disproportionately from low educational attainment and to struggle to gain access to higher education. Cuts in student financial aid and a steady retreat from established civil rights initiatives have resulted in a decline in the rates of higher education participation for all minorities, but particularly Hispanics. The Department of Education's abrupt departure from its long-standing policy supporting targeted minority scholarships presents yet another obstacle to Hispanic and minority participation in institutions of higher learning.

As indicated in a recent NCLR report, *Hispanic Education: A Statistical Portrait 1990*, Hispanics are still seriously underrepresented as college students nationwide. College attendance by both middle- as well as low-income Hispanic youth has declined over the past 14 years. The proportion of 18- to 24-year-old low-income Hispanic high school graduates enrolled in college fell from 50.4% in 1976 to 35.3% in 1988. While White middle-income

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youth experienced relative stability in their college enrollment during this period, the percentage of middle-income Hispanic high school graduates attending college declined from 53.4% in 1976 to 38.5% in 1987 and 46.4% in 1988. The percentage of all minority high school graduates entering college hit a peak in 1976; however, Hispanic enrollment rates have never equaled the 1976 high in any subsequent year. Rates of Hispanic college participation have increased slightly in the past years, but remain below the 1976 peak (36%). Data from the 1988 Current Population Survey indicate that Hispanic 18- to 19-year-olds comprised only 6.7% of total college enrollment, compared to 9.2% for Blacks and 86.6% for Whites. Hispanic high school graduates continue to have lower rates of college enrollment than White high school graduates at all ages. By age 20-21, only about one-fourth (26.8%) of Hispanic high school graduates are enrolled in college, compared to nearly half of Whites (46.5%).

One of the factors discouraging Hispanic enrollment in higher education is the cost of education and the relatively low incomes of Hispanic families. Even for those who finish high school, financial aid cuts deter students with low socio-economic backgrounds from attending college. Compared to Whites and Blacks, Hispanic students must rely *less* on grants and *more* on student loans at larger average loan amounts to finance postsecondary education. Hispanics also tend to rely heavily on self-support and parental support in financing college costs, although low family incomes make parental support difficult.

Hispanics are more dependent than Whites upon federal financial aid to help finance a college education due to low income levels, so they have been particularly hard-hit by cuts in federal aid. Basic Education Opportunity or Pell Grants, for example, were designed to enable economically disadvantaged students to attend postsecondary institutions. In the mid- to late-1970s such grants accounted for about 80% of student funding. Today Pell Grants account for only 15% of student funding. Despite the fact that Hispanics are three times as likely to be poor as Whites, only 40.9% of Hispanic college students received any federal financial aid in 1986, compared to 55.7% of Blacks and 32.0% of Whites.

Other factors beyond economic disadvantage, however, inhibit Hispanic student access to higher education. Increasing school segregation and disparities in school financing systems combine to produce a second-class education even for those Hispanics who manage to complete high school. In addition, Hispanics complete fewer "Carnegie units" and fewer advanced math, science, computer, and English courses than other Americans, and are more often "tracked" into courses which make college entrance unlikely.

At a time when increasing the access of Hispanics and other minorities to postsecondary education is of the utmost importance, the Department of Education's new minority scholarship policy is quite troublesome. At best, it sends the wrong signal to university administrators who, in good faith, are attempting to increase minority enrollments. At worst, it gives aid and comfort to those who seek to reduce higher education opportunities for minorities. Inevitably, the policy will have a serious "chilling effect" on current and proposed efforts to promote increased access of Hispanics and other minorities to postsecondary education.

Moreover, the way in which the proposed policy change was initiated is suspect. The Department took this action unilaterally and affirmatively. It reversed long-standing statutory and regulatory policy without benefit of formal rulemaking or guidance from the courts. It failed to consult with

Congress, the higher education community, or minority groups. This process reflects either a startling naivete or a conscious effort to polarize the issue in a way that impedes, rather than promotes, consensus on a highly sensitive issue. We view, with much suspicion, this kind of sanctimonious and hypocritical appeal to strict interpretation of civil rights laws, particularly when it subverts the true purpose of such laws. Instead of focusing on narrow legal issues to address problems that do not exist, the Department of Education needs to apply its time and resources to finding solutions to the very real, critical, and pervasive problem of the underrepresentation of minorities in higher education.

The attempted "clarifications" of the policy issued yesterday by the Department in fact cause further confusion. In effect, the Department has indicated it will "go slow" on implementing its revised guidelines on minority scholarship policy. In the meantime, it virtually invites complaints from those who seek to eliminate all scholarship programs that benefit minorities. Those colleges and universities that have failed to remove barriers that reduce minority access are given a green light to do nothing.

Mr. Chairman, the problem before us is not that Hispanics and other minorities are taking advantage of the educational system. The egregious problem is that a large number of our total population is being denied an opportunity to develop their full potential. This is a real problem to which we urge Congress and the Administration to devote serious attention. As I have indicated, the scope of the problem for the Hispanic community is massive in scale. The educational disadvantages facing Hispanics are widespread, and occur in every region of the country and across all Hispanic subgroups. Increasing Hispanic educational attainment is a prerequisite to improving the social and economic status of Hispanics -- and to keeping the nation economically competitive. Failure to improve educational access, opportunities, and outcomes for Hispanic students now will have enormous long-term costs for the individual, community, and society.

Mr. **Hayes**. Thank you.

Mr. Davis?

Mr. **Davis**. Thank you.

First, I would like to thank the Chair for allowing me to give testimony on this issue. The phones in our office have been ringing off the hook. The U.S. Student Association is the largest student group in the country representing 2.5 million students.

I think it is very important that we be able to give our opinion from the students' perspective and thank you, again, for letting us have this opportunity.

I have listened to a lot of the speakers and in setting this up so I could give the testimony, the thing that upset me most was that there was not a student perspective.

In terms of the historical perspective, I don't know if that has been brought up enough, people understanding historically why those scholarships are in existence.

I am sad to see that Mr. Coleman has left, but that is okay. I will give him a visit and have some students from his district give him a visit as well.

Mr. **Hayes**. He will be so informed.

Mr. **Davis**. Again, I think what is happening, what President Bush is doing in his whole Administration is experiencing lapse of memory. I think that they don't remember that there were indigenous people in this land, that loved this land and didn't want to tear down trees to build factories, who were concerned about the welfare of the environment. I think they don't remember that Asian Americans were promised a land of opportunity only to be brought here as cheap labor.

I think they fail to realize that Arizona and California and New Mexico were Mexico. I think they fail to realize that for the African-Americans in this country who suffer under oppression, that we did not ask to be here but now that we are here, we are still waiting for our 40 acres and a mule.

With all that memory lost, at the very least what they could be providing is education. Too many times we as students turn on our TV sets and see our brothers and sisters being hauled away with arms behind their back because of lack of opportunity in our community.

Time and time again we are told we are too lazy; we are not focused and we cannot do it and it is our fault.

Mr. Williams, I use the word "Mister" lightly, I think is putting forth this attitude of pull yourselves up by your bootstraps. I think he fails to realize that some of these folks don't have boots.

What we are looking for is for the Federal Government to provide books. I think that this whole issue brings up another broader issue, in fact, the fact that the Reagan Administration right now doesn't sound any different to me than David Duke. Everything David Duke said on Jesse Jackson or Night Line mirrors the actions of the Administration.

I think it is sad. These scholarships that are provided for traditionally disenfranchised people—first we need to understand that there is not a lot of these scholarships being provided. The majority of students of color who attend college are getting grants or loans, but more often loans because Bush and Reagan decided that grants were not the way to go.

The only opportunity that these students have to get an education, and the whole question of legality brings to my mind—you know, I played football in high school but I did not get a athletic scholarship. Is that discriminatory?

I think that there is a reason for everything and that the real focus of the Administration is to actually bring all these questions out in the open and push the fact that white males feel oppressed in this country.

For as many white males that feel that way, I would love for them to come and live in my neighborhood where I grew up and let them see the hunger and starvation and deprivation of our neighborhoods and neglect.

I am very frightened right now. I don't really know how to react to our Federal Government. Those I am sitting here at the table with a tie on and speaking in front of a congressional committee, I still feel like I am in jail. I feel that anything that will help to move our people forward will be beaten down by those who are not interested in moving our people forward.

So in my testimony I put down statistics and I am not going to read them—I have copies for those who are interested. What is the most important to us is that not only do we reject this type of thought, but that we go full—into full gear into providing opportunity.

We need to double our efforts. I can't tell you how many times I have watched the football games or the baseball games and see commercials about the Army saying "be all you can be." It would bring a smile to my face to see a commercial that said "be all you can be, go to college and here is the money to do it."

So I want to thank you for letting us speak. My testimony has all the information concerning citizens of color and their participation on the campuses and the views of students who are actually receiving these scholarships. So thank you very much.

[The prepared statement of Julius A. Davis follows:]

USSA "Organizing and Advocating for Students Across the Country"

U.S. Student Association/1012 14th St., NW, Suite 207/Washington, D.C. 20005/(202) 347-USSA

The United States Student Association is the nations oldest and largest national student membership organization representing more than 2.5 million college and university students. USSA number one priority is insuring access to higher education for all students.

I would like to thank the chair and the distinguished members of the committee for allowing me give testimony on this critical issue. Since the original announcement of the Department of Education on the legality of scholarships based solely on race, the phones at the USSA office have been ringing off the hook! This is clearly an issue that students have reacted to with great consternation. Therefore, we are anxious to air our concerns to this from the student perspective.

HISTORICAL PERSPECTIVE

I think that far too often, some of us experience a lapse of memory. Some would say that people remember history selectively and that they do not find it necessary to bring the real history to the forefront of a discussion on affirmative action. Some people ask how long do we have to keep affirmative action, well we kept slavery and other violent forms of oppression on people of color for 300 years with few in an urgent rush to end it. Possibly 300 more years of affirmative action will give people of color time to recover our minds from the trauma that was inflicted upon us and finally provide people of color a true equal opportunity for success in this country.

A recent history replete with discrimination against people of color has burdened this nation with a legacy of a desperately unequal educational opportunity for the vast majority the traditionally disenfranchised in this country. We can look no further than the backyard of the nations capitol (where our streets have become battlegrounds for the neglected to feed upon themselves in order to survive) to the barrios of East Los Angeles (where children of an oppressed people wander the streets in search of a dream deferred) to see the malign of exploitation and neglect.

Surely Asian Americans, who were promised a land of opportunity and riches, only to find impropriety and exploitation
at the hands of the proprietors of sugar plantations to provide cheap labor, and who are now victims of stereotypes as a successful or model minorities, did not ask for this added wrath of discrimination that has been and is continually visited upon them every time they walk into a computer class or watch a Chrysler commercial. When they were no longer needed as cheap labor, anti-asian hostility swelled, punctuated with mob violence, political agitation, public executions and finally discriminatory legislation. Racist legislation was used to curtail and often deny rights.

Few Americans really know of Mexicanos and Californios. The names of Juan Courtina, Gregorio Cortez, and Joaquin Murrieta are unknown even to most professors of American history. These men, who defended their people, against all odds, only now to lay in their graves and watch their people be denied the rights of preference from a society that robbed them blind! Unequivocally, we must recognize the problem of language difficulty that poses a need in the relief area that is frequently ignored and often attacked through english-only campaigns.

The official disingenuous dehumanization of African Americans began in the United States Constitution which was adopted in 1789. Article 1, Section 2 states that Representatives and direct Taxes shall be apportioned among the several States and their respective Numbers...shall be determined by adding to the whole Number of free persons, including those bound to Service for a Term of Years, and excluding not taxed , three fifths of all Persons. The three fifths of all persons, of course, were the slaves.
Racism and the dehumanization of African Americans were disingenuously written and adopted into the constitution of the United States of America!

The other high sounding statement that African Americans was set forth in the Dread Scott case in which Chief Justice Taney said that African Americans had no rights which the white man was bound to respect. Taney was saying that it was impossible for African Americans to be citizens of the United States.

Native Americans, scorned and afflicted with the most brutal acts of genocide known to humankind, no doubt have the greatest claim to preferential treatment, the greatest moral claim. In 1796, one Tribal chief stated We love the quiet; when the woods are rustled by the wind, we fear not; when the leaves are disturbed in ambush, we are uneasy; when a cloud obscures our brilliant sun, our eyes feel dim, but when the rays appear, they give great heat to the body and joy to the heart. Treachery darkens the chain of friendship; but truth makes it brighter than ever. This is the Peace that we desire.

But the vast majority of Native Americans were not to have that peace, no more than the African American, Mexican, Californios, Asian Americans and Pacific Islanders or any other groups that was seen over the centuries an obstacle to the dynamic expansion of America

If human progress follows a law, if times noblest offspring is the last; our civilization shall be the noblest, for we are heirs of all ages in the foremost files of time and not only do we occupy the latitude of power, but our land is the last to be occupied in that latitude, wrote Frederick Jackson Turner in 1890.

Back then, foreign observers found the American experience puzzling. Gunner Myrdal described it as a dilemma. The nation was the birthplace of modern democracy, and yet it institutionalized racism. Equality and freedom were born on the same soil as slavery and white supremacy. Frontier democracy was itself partly shaped in wars against the Native Americans and Mexicans and only through collective agreement and political equality could the settlers protect the land that they had taken. Each white man was entitled to one vote - and a gun!

Yet time and time again, attacks on affirmative action, whether its the Civil Rights Act or scholarships set aside for individuals who are members of a traditionally disenfranchised group, are more prevalent then ever before. It is as if some people believe that racism does not exist.

Affirmative Action is essentially a matter of positive policies, programs and procedures designed to correct past and present discrimination in the experiences of people of color, women, and other discrete groups. Affirmative action is a special instrument for dealing with discrimination, but is not simply the absence of discrimination itself. It is not possible to fully recognize the humanity of African Americans and at the same time be indifferent to making amends for more than 200 years of slavery and 100 years of legalized discrimination and second class citizenship that we have experienced. The great wrongs of the past can not be effectively dealt with today through racial neutrality and indifference. This nation, no

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matter how much we might want it to be, is not a color blind society.

The public has been led to believe that affirmative action is nothing more than a rip-off, that is an effort to place one form of discrimination with another form of discrimination. And Ronald (voodoo) Reagan and George (deja-voo-doo) Bush have done every thing that they can to play to this type of logic.

THE NEED FOR SCHOLARSHIPS FOR PEOPLE OF COLOR

Between 1976 and 1988 the percentage of low income African American and Hispanic youth graduating from high school has steadily increased. In 1988 60% of low income Hispanic males, and 43% of Hispanic females graduated from high school. That same year 53% of low income African American men, and 69% of African American females completed high school. The percentage for Hispanic and African Americans who actually go on to attend college after high school has decreased precipitously between 1976 and 1988. In 1976 50.4% of low income Hispanic high school grads went on to college, the number decreased to 35% in 1988. African American high school gradutes enrollment in college dwindled from 39.8% in 1976 to 30.3% in 1988.

These statistics, compiled by the American Council on Education, clearly indicates that dispite the fact that more students of color are graduating from high school, less are going on to college. USSA believes that the root of this alarming trend could be found in the education policy of the Reagan/Bush administration. College attendance of students of color rose 56% during the early 70's, during the same time the Pell Grant program was being funded at it's highest levels, which accounted for 80.3% of aid given. Whereas in the 1980's Pell Grants only accounted for 48.5% of ferdral financial aid given. There is a direct correlation between the availability of grants and the attendance of low income students of color in the post-secondary school level.

During the 1980's middle income African Americans and Latino's have been forced out of higher education. According to the American Council Education, in 1976, 52% of middle income African American high school graduates went on to college. By 1988 that number had fallen to 36%. The rate of Latino high school grads going on to college dropped from 54.4% in 1976 to 46.4% in 1988. All of these fact s led the A.C.E. researchers to conclude that comprehensive and sustained efforts are needed at the institutional level to recruit, retain, and graduate larger numbers of minority students . We believe that the policy proposed by the Assistant Secretary for Civil Rights last week was clearly antithetic to this conclusion and seeks to deflect attention from the crisis this nation is facing in education.

Education is an investment in the future of this nation. The Reagan/Bush Administration s lack of commitment to education for the past decade has gravely jeopardized the future of this nation. In the past ten years education has only accounted for less than 2% of the annual budget. This intolerable situation precipitated a dramatic increase in tuition, during the 80 s college cost has incresed 30%, as colleges and universities have scrambled to compete of a shrinking pool of students and a grants provided by the Federal Government. Consequently access for all students has been significantly reduced. Students of color and poor students have been disproportionately effected by the increaces in tuition, since they rely on federal and state financial aid. In light of the present situation, scholarship programs have taken on an even more important role in redressing past discrimination. Moreover they play an essential part in promoting pluralism on many college campuses.

CONCLUSION: OUR FUTURE AT RISK

USSA believes that the policy articulated by the Assistant Secretary of Education last week, is part and parcel of the Bush Administrations position of opposing any policy that seeks to redress past discrimination. Last weeks policy clearly presumed that this is a color blind society, in which racially conscious remedies are an intolerable affront to the egalitarian precepts that are commonly recognized and accepted by the vast majority of society. This presumption is unrealistic and dangerous.

Any form of financial aid that is set aside for traditionally disenfranchised people is no different than any other type of aid given as preference. There is nothing wrong with preference in this country. Ask President Bush, who has always given members of his party preferential treatment.

Ask the university admissions officers, who historically and continually prefer the sons and daughters of alumni, of faculty, of staff, of big donors. Ask the owner of a company what's wrong with preferring his daughter or son to move up the lines of management.

And what about the G.I. Bill's preference: For years, women's groups that tried attacking the absolute veterans preference and nobody ever asked for doing away with veterans preference. It is really ironic that it is some of those same people who find goals and timetables and the more statistical analyses that go into some affirmative action plan so repugnant. And I really think at some point that the hipocracy of using preference when it conveniences you an decrying preferences in other instances really has to be addressed.

We must always continue to work towards addressing the effects of oppression, exploitation and neglect. To look at the issues of race with blinders on just helps to perpetuate the problem. We are a better nation than that and must function accordingly.

By the year 2000, one third of the school age children in the United States will be people of color. America is a diverse country. In our quest for racial harmony must do more than recognize the mere presence of multiple ethnic and racial groups, we must work towards pluralism, especially in higher education. Lets open the doors to education, invest in schools instead of prison or the military, and answer the challenge of harmony with a realistic formula.

Thank you.

Mr. **Hayes**. Thank you.

Ms. Byrd.

Ms. **Byrd**. Thank you, Congressman Hayes. I would like to extend my thanks to Chairman Hawkins for providing us the opportunity to express our views on this issue. I am one of three staff lawyers at the NAACP Legal Defense Fund who work in the area of education.

But for the announcement by Mr. Williams, I would have been able to work on my cases for the past week-and-a-half. Instead, I have been trying to figure out what he is saying. Congressman Smith is right when he said it is nonsense and Judy Lichtman is right when she says it is gobbledygook.

I want to point out a couple of reasons why anybody ought to call the President and say you ought to rescind this policy. It ought to be done in a responsible way and it ought to make sense to somebody.

At this point, it certainly does not. Let me walk through a couple of points in what was issued yesterday that no one can understand and that makes no sense.

On the six points that were announced, point number 2, which allows universities to use money from private donors only to fund racially-specific scholarships, if you use that logic, then basically Harvard could give money to Yale for racially-specific scholarships, Yale could give money to Harvard for racially-specific scholarships, but neither one could fund those scholarships at their institutions.

If a private donor were to give $100,000 and leave that money un-earmarked, then that money could never be spent for a scholarship to improve minority attendance at a institution. However, if the donor specifies it, then it has to be spent for minority scholarships, presumably for all time.

An educational institution would be required to raise money saying that we want this money earmarked for this purpose and their hands are tied in the future with respect to changing the uses for that money suppose the needs are different. It makes no sense.

David Tatel's point in saying the distinction on the funds from private entities contrasted with the school's own funds runs headlong into the Civil Rights Restoration Act of 1988.

If the Office for Civil Rights means to be the law enforcement agency that Mr. Williams says it is, it ought to at least know the law. Clearly, it doesn't.

Its third point which says that the race-exclusive scholarships funded by State and local governments are covered by Supreme Court decisions construing the Constitution and thus cannot be administered.

OCR is able to administer as well as private schools. They have been interpreting Supreme Court decisions for years. What is he talking about?

Point 4, given the evident confusion among universities on the preceding point, the Department of Education will provide universities a four-year transition period in order to permit universities to come into compliance.

Point 3 already said OCR didn't have jurisdiction, if you assume they have no jurisdiction, what is the point of giving a four-year period of compliance?

OCR cannot say that if something is illegal, we won't enforce the law for four years. They are not Congress. They cannot control the applicable of Title VI.

Point 5, during the four-year transition period, OCR will not conduct in effect broad compliance reviews, but will investigate any complaints.

It makes no sense to investigate complaints if the agency is going to give you a four-year compliance grace period. This is absolute nonsense.

It is mischief. It is irresponsible, and it is callous, and the President should be prevailed upon to rescind this. Any responsible government official could not endorse this as a policy of the United States Government.

It ought to be rescinded and if something needs to be done, then it ought to be done in a proper manner instead of something like this which I think is embarrassing to the country.

Thank you.

[The prepared statement of Janell M. Byrd follows:]

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STATEMENT

OF

JANELL M. BYRD, ASSISTANT COUNSEL
NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

BEFORE

THE COMMITTEE ON EDUCATION AND LABOR OF THE
UNITED STATES HOUSE OF REPRESENTATIVE

CONCERNING

THE DEPARTMENT OF EDUCATION, OFFICE FOR
CIVIL RIGHTS' POSITION ON MINORITY SCHOLARSHIPS

ON

DECEMBER 19, 1990

Contributions are deductible for U.S. income tax purposes

The NAACP Legal Defense & Educational Fund, Inc. (LDF) is not part of the National Association for the Advancement of Colored People (NAACP) although LDF was founded by the NAACP and shares its commitment to equal rights. LDF has had for over 30 years a separate Board, program, staff, office and budget.

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Mr. Chairman and Members of the Committee: I am Janell Byrd, a staff lawyer with the NAACP Legal Defense and Educational Fund, Inc. I thank you for this opportunity to testify on this issue of utmost concern not only to the Legal Defense Fund, but to all people concerned about the future advancement of this Nation.

The Fund has handled many cases in efforts to improve educational opportunities for African Americans. Among those was Adams v. Richardson, a recently dismissed case that was filed in 1970 against the Department of Education and the Office for Civil Rights for misconduct reminiscent of that occurring today -- misconduct that undermines the letter and the spirit of Title VI of the Civil Rights Act of 1964, and denies the protection intended by the statute to those for whose benefit it was passed.

OCR is charged with the responsibility for enforcing Title VI which by its terms prohibits discrimination on the basis of race, color or national origin in any program receiving federal funds. By its letter and its spirit, Title VI clearly intended to increase educational access for racial and ethnic minorities as seen in several of its regulations governing compliance. Under the Department's own Title VI regulations the enforcement scheme is to be carried out through compliance reviews or complaint investigations to determine whether a recipient of federal funds is in compliance with the law. 34 C.F.R. § 100.7. These are intended to be fact based determinations of compliance with the statute -- its letter and its spirit.

Looking at the chaos visited upon the Nation's students and colleges and universities by Assistant Secretary for Civil Rights

Michael Williams' recent announcements on minority scholarships, it is readily apparent that instead of trying to eliminate barriers to educational opportunities for those disadvantaged and excluded from America's mainstream by virtue of the color of their skin, OCR is focusing on ways to erect such barriers. It has made itself the watchdog designated to assure that opportunities for minorities are not too easily found and exercised. In doing so it has ignored the crisis in minority education in this country. It has ignored the growing gap between black and white college enrollment, the significantly lower income of blacks compared to whites, and the universal agreement that the path out of the cycle of poverty is education. It has ignored the fact that this is not a colorblind society and never has been. Mr. Williams' assertion that no significant decision should be based on race comes out of a fantasy land of right-wing ideology not based on fact but absolute fiction. Not only are Mr. Williams' actions legally wrong and misguided; they are downright bad educational and social policy.

When OCR announced its new policy through a press release distributed with the Agency's precipitous warning to Fiesta Bowl officials that scholarships for minorities would violate Title VI, there was no doubt that it was OCR's actions -- not Fiesta Bowl officials -- whose conduct was improper. OCR acted without a complaint, without the process of a compliance review or other investigation, without factual findings, without notice of a new policy interpretation order and without debate. The real and potential harm caused by OCR's callous and reckless approach is evident not only in the confusion created among college and university officials, but also in Mr. Williams' admission that he has no idea what scholarships exist that are affected by his policies.

Indeed the entire matter has been handled in such a slipshod fashion that it is imperative at this point that someone do what Mr. Williams and OCR should have done and that is prepare a comprehensive legal analysis. There are many unanswered questions and so many loopholes and inconsistencies in what OCR has distributed that the Legal Defense Fund is itself undertaking to prepare such an analysis and will offer to the Committee a legal memoranda on the issue. Given the speed with which this has happened, we were not able to do that for today's hearing.

I will however, point out some of the most obvious problems with OCR's December 4, 1990 letter to Mr. John Junker and the simultaneously released press statement. OCR misled the public through misrepresentations, misstatements and misapplication of the law on several counts. First, it asserts that race specific scholarships are generally prohibited by Title VI. This is clearly misleading given that race specific scholarships are unquestionably authorized where institutions have a documented history of race discrimination. OCR itself has incorporated them in many of its higher education desegregation plans. The Title VI regulations require that where an institution receiving federal funds "has previously discriminated against persons on the ground of race, color, or national origin, the recipient must take affirmative action to overcome the effects of prior discrimination." 34 C.F.R. § 100.3(b)(6).

Williams' letter misrepresents the law in referring to the regulatory section cited immediately above by implying that a "court or administrative order, corrective action plan, or settlement agreement," is a necessary prerequisite to taking such affirmative action. The Supreme Court specifically declined that position in Wygant v. Jackson Board of Education, 476 U.S. 267 (1986), and has approved voluntary affirmative action measures in a number of contexts. In the minority set-aside case, City of Richmond v. J. A. Croson Co, 488 U.S. 469 (1989), the Court indicated it would continue to approve voluntary affirmative action measures where there was adequate documentation of a history of discrimination. A court order or other federal intervention was not required.

But even while acknowledging that race specific scholarships were available under certain circumstances, OCR's December 4, 1990 letter applies its generally stated prohibition to include institutions with a well-documented and well-known history of race discrimination. The two Universities involved in the Fiesta Bowl have well-documented histories of race discrimination. The University of Alabama is today in trial in Birmingham, Alabama in a suit brought by the United States Justice Department for racial discrimination. It was referred to the Justice Department, along with the entire State of Alabama, because of an OCR finding of non-compliance with Title VI. Similarly, the University of Louisville is part of the State of Kentucky's higher education desegregation plan required by OCR because of its history of race discrimination. OCR itself has required race specific scholarships at the University of Louisville. It boggles the mind to understand how Mr. Williams could have concluded that it would have been illegal for these institutions to have a race specific scholarship.

Neither the December 4 letter or press release adequately addresses equally important Title VI regulations that, even without prior findings of discrimination, permit universities to:

> ... take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color, or national origin. 34 C.F.R. § 100.3(b)6(ii).

Nor does the letter refer to the provisions that encourage universities to:

> ... give special consideration to race, color or national origin to make the benefits of its program more widely available to such groups .... [universities] may establish special recruitment policies to make [their] programs better known and more readily available to such groups and take other steps to provide that group with more adequate service." 34 C.F.R. § 100.5(i).

It was a total failure of responsible government decision-making and behavior to threaten the nation's college students and their universities and colleges with the loss of federal funds in such a one-sided, incomplete, misleading and legally improper manner.

OCR's latest policy making by press release was an absolute disaster. The purported partial reversal of the policy at yesterday's press conference served to foster more confusion, create new conflicts with existing civil rights laws and reaffirm at least parts of the prior policy. At this point, the Administration must simply and completely rescind the policy in its entirety.

The six points announced yesterday, which are more confusing than the original policy, cannot possibly be described as proper legal guidance from any responsible government agency or official.

Point One. "The Administration fully endorses voluntary affirmative action in higher education, and encourages educational opportunities for minority and disadvantaged students." How can this be when the next several points outline a retreat from voluntary affirmative action through minority scholarships?

Point Two. "[The Department of Education] has decided that . . . Title VI [enforcement will] permit universities . . . to administer scholarships . . . funded entirely by private persons or entities where the donor restricts eligibility for such scholarships to minority students. . . . [H]owever, private universities receiving federal funds may not fund race-exclusive scholarships with their own funds." This is nonsense both as a matter of law and educational policy. If it is somehow illegal or discriminatory for the university to fund minority specific scholarships with its own funds then it would seem to be illegal for them to administer them as well. This approach seems to run head-long into the Civil Rights Restoration Act of 1988. The second sentence which reads as an outright ban on race specific scholarships at private universities runs counter to the Title VI regulations that require affirmative measures where the institution has a history of discrimination.

As a matter of educational policy point two makes no sense. This approach would allow Harvard to give money to Yale designated for race specific scholarships and Yale to give money to Harvard designated for race specific scholarships, but neither to fund them at their own institutions. It, in effect, says that if a donor gives $100,000 to an institution with no specific designation, then none of that money could be allocated to minority specific scholarships, but if the money is so designated, all of it must presumably forever be dedicated for such purposes. This ties the hands of university officials in fund raising, limits discretion based on factual changes in the need for such programs, and benefits more well-endowed universities over relatively poorer ones.

Point Three. "Race-exclusive scholarships funded by state and local governments are covered by the Supreme Court's decisions construing the Constitution and thus cannot be addressed administratively." OCR is required by law to apply Title VI to state as well as private schools. It has been interpreting and applying Supreme Court decisions for years as it purported to do with this decision.

Point Four. "Given the evident confusion among the universities on the preceding point [three], ED will provide universities a four-year transition period in order to permit universities to [come into compliance]." Again this makes no sense. Point three says that OCR cannot address the issue with respect to state and local funded scholarships. If that is so, what does OCR intend to do after four years if the issue is outside of its jurisdiction. Furthermore, OCR cannot legally refuse to enforce the law for four years if indeed there are legal violations.

Point Five. "During the four-year transition period, [OCR] will not [conduct broad compliance reviews but will investigate any complaints]." What is the point of investigating complaints if the Agency is applying a four year compliance grace period.

Point Six. "The Administration will encourage state legislatures, local governments, and private universities . . . to carefully review . . . legal restrictions on minority scholarship programs imposed by the courts, so that [they] may continue . . . to provide scholarship assistance to minorities." There is only one such case of which we are aware. It was decided prior to *Bakke* and was not appealed.

It is unfortunate that Mr. Williams declined to attend this hearing because he needs to explain -- other than by two page press releases -- what his office is doing. He needs to explain his utter failure to follow the law and agency procedure.

OCR's actions on this issue have been irresponsible. They will deter minority students whose elementary and secondary school efforts are directly affected by whether they *believe* there is an opportunity for them to attend college. The signal OCR has sent is that the Nation does not care about them.

OCR's actions also will deter colleges and universities from taking steps to address the exclusion of minorities from higher education by sending confusing messages as to what is legal coupled with warnings that schools could lose all federal funding. Furthermore, in today's climate of tight state budgets where schools are looking for ways to cut enrollment and reduce aid, encouraging schools to cut funding for minorities will have a devastating effect on the already low minority enrollment in higher education.

I want to thank the Committee for having these oversight hearings and encourage you to continue them in the upcoming year to try to bring OCR officials in to explain their behavior. If the matter is not responsibly resolved, I encourage you to consider legislation that would make clear the ability of colleges and universities to use these minority scholarship programs to increase minority access to colleges and universities. Thank You.

Mr. **Hayes**. Thank you very much for your testimony.

I will call on my colleague, Mr. Petri, to see if he has questions.

Mr. **Petri**. Thank you, Mr. Chairman.

I just have one or two questions. I will be brief.

I am struggling, I guess, to try to figure out if the difference between Mr. Williams and the Administration or Williams II now and the Administration position and your position is as great as you say or if you are magnifying the difference and there is not that much.

I guess they are now saying that race may be a factor in scholarships, but not the only factor, and people should take into account such things as economic need in awarding scholarships and not give one to a wealthy black as opposed to a poor white.

Would you agree with that or would you say that they can set aside money and it should go on to people who belong to a particular group regardless of economic need and deny that money to someone who doesn't belong to that group?

Ms. **Byrd**. There were a number of points that you raised first about the difference between our position and Mr. Williams. We don't know what Mr. Williams' position is because it makes no sense, period.

There are bits and pieces of law in what he stated, but he stated at the press conference that his original position was still correct. That is impossible, because under his original position he said basically that the University of Alabama, which has a very long history of discrimination, which is today being sued by the United States Department of Justice for Race Discrimination, that that institution could not have a racially-specific scholarship.

That is contrary to OCR's practice which referred the University of Alabama along with the entire State to the Justice Department for enforcement because it was slighting Title VI.

If you are going to correct a history of race discrimination, then you have to take race into account to address that problem.

As to whether a well-to-do black kid versus a poor white kid, I think that is an interesting question, but often the fact for two reasons. One, blacks across the country or on average, I should say, have an average income which is significantly lower than whites, so for the most part, you have a lot of black children who are black or black students who are applying who simply don't have the money.

The number of those scholarships are not that large. So among the blacks, not all the blacks are going to get one of these scholarships. Within the way they will apply this, they will factor in need. It is not like you have money going to the children of the rich.

I think that that is kind of a fiction that people are coming up with when, in fact, the way the dollars are going they are needed, but that is not the only base that legitimizes it. If you need it for diversity purposes that is an honorable way to administer the money, as well.

Mr. **Petri**. I agree. You can always construct an extreme case, but it is not the usual case, let's say. Basing scholarships on need would, as you rightly say, tend to favor traditionally unrepresented groups, Hispanics, blacks and so on, and you don't really need to go beyond that which tends to undercut the idea of integration and the color-blind society as an ultimate goal by saying it is all right because of historic discrimination to set up race-specific scholarships for traditionally under-represented groups regardless of economic need or anything else.

That kind of undermines the effort to try to bring the community together over time and it is not necessary because it doesn't affect many cases at all. It will lead to a few extreme cases people point to and demagogue about—like the son or daughter of a doctor who is getting a free ride while a deserving student of another race who has a need is not.

Ms. BYRD. There are all kinds of scholarships that are granted at universities in the country. Lots of it goes because you want to attract different kinds of people to an institution and the institutions believe that that is important to the educational process. We believe that it is important to allow institutions the freedom to try to attract those students.

We see that despite billions of dollars allocated on the basis of need that lots of minority students still don't get the funds they need and this will provide that adjunct to the scholarships that are there. So I think there is a legitimate basis upon which these scholarships should be maintained. I think there is a legitimate justification based on historical discrimination, which was very race specific, to justify a corrective measure which is always race specific.

Mr. PETRI. Well, if the result we want is a non-race-specific society, I am not so sure that is really right, at least as a permanent solution.

Ms. BYRD. I didn't say it is permanent, but it is a remedial measure.

Mr. PETRI. The Washington Post, in its December 13th editorial outlined something pretty much in line with what the Administration came out with, saying that it should be a factor but not the exclusive factor. We should move away from explicit racial and other designations, they say, that are offensive and defeat the purpose for which they should be used, and other than in special circumstances, they ought to be stopped.

So there are other voices out there saying that we should be working to try to reach out, obviously, and to be inclusive and bring groups in, but then as you are giving public money for scholarships, or corporate money or institutional money for scholarships, you would think you would want to take into account other factors than race exclusively. That may be one factor because it does obviously help, other things being equal, to promote diversity, but if you ignore need, if you ignore wealth, if you ignore academic ability and say we are going to give it to you because of your race, that seems to me un-American.

Ms. BYRD. The people have already been admitted to the schools and the question is whether you have a pot of money that you can use to promote diversity in the institutions. You recruit the black students and it turns out there are X number of need dollars that get spread over X number of students and the students cannot get the money that will allow them to attend the institution, then you have lost your opportunity to diversify.

Mr. PETRI. This can tend to hurt poor minority people too indirectly. You know what goes on between the institutions as they compete for good athletes and there are enormous incentives put out by some institutions. The same thing can happen to compete for able minority students and therefore they will ignore need and give a free ride to people who can very easily afford it in order to say they are diversified and meanwhile there are going to be some poor minority students who could have qualified for a scholarship who are going to be behind in that line.

It seems to me something we ought to be sensitive to and not just say, well, it is fine to allow race-specific scholarships, when what we may be doing is helping people who are in a particular group but who can easily help themselves.

Ms. **Byrd**. That happens with respect to white students; a lot of white students get money who don't need the money, their parents can afford to send them to school. That is not unique to minority students.

Mr. **Petri**. People have set up scholarships for graduates of particular high schools, for all sorts of quirky reasons, so to speak, that end up favoring people because of where they are from and all kinds of things. But we are talking now about community funds, in effect, not private funds, and whether we ought to be doing this on a race basis with community funds.

Mr. **Yzaguirre**. There are two reasons why we award scholarships: One, to help the individual, and the other, to help the university.

To help the university promote diversity, we do it on the basis of geography. We want sons of firemen in universities, sons or daughters of alumni, rural as well as urban people. The notion is well-established that that is a legitimate end for a university to promote. To enrich the value of a college education one needs to have it in a setting with a diverse student body.

The other reason you do it is because people are deserving. We are trying to fine-tune a situation where somehow economic need is more deserving than racial repression. I can't make all those kinds of decisions and be able to say which is more deserving. Maybe other people can.

But I suggest to you that the national picture is not one where we have a lop-sided situation. What I am trying to say is that I can offer to you reams of evidence that Hispanics are not able to attend college because of financial difficulties, because of discrimination, because of entrenched institutional bias.

I will accept that burden and present evidence to this body, to any other body in the country and make what I think is a persuasive case. I don't know of any body of information that leads anybody to conclude that we have a serious problem because disadvantaged whites are getting the short end of the stick because they are being passed over in favor of minorities.

If that were a real situation, then I think we would have to look at it objectively and try to come up with some kind of solution as to equity, but that is not the real world. The real world is we are still being discriminated against. We have serious impediments, and our universities are suffering because they are not educating a significant body of our population and because they don't have the diversity they need that is reflective of the society that we are living in.

Mr. DAVIS. I would like to touch on the question of preference; America has always welcomed preference and that probably the difference between this type of preference and that of an owner moving their son or daughter up through the company is that this is more out in the open. The preference that happens when someone who owns a company and wants to see their children move up in the company isn't talked about, it is just done.

Here it is talked about because there are people who are oppressed and interesting in making a better life for themselves. Again, that was a really good point in terms of the real world and where we really are right now and how many people would actually suffer from this type of policy given the number of minority scholarships based on race that are out there.

I maintain that we aren't doing enough as it is already, that we should not even start to consider rolling back affirmative action. If anything, we should be doubling up on it, finding stronger ways of making things happen because the formula that President Bush has, the education President, hasn't worked. It hasn't worked with Reagan or for any of the presidents of this country, and though some may see me or other people at this table being dreamers, we truly care about our community, so we feel that it is important for you to understand.

I would invite you to hang out with me in my neighborhood a week and get to understand what is happening there. That really isn't the question because preference happens throughout this country, whether it is veterans preference, whether it is someone owning a company or preference of a child being able to get into school as opposed to someone else and how many doors that that action closes.

Chairman HAWKINS. [Presiding.] I quite agree.

I think you put your finger on it. Only a very, very small percentage of financial aid to students goes to minority students, and a majority of whites are not being passed over to give such scholarships to blacks.

Scholarships are given based on being a Mormon or Protestant or if you are from certain sections of the country and then you get down to the small percent of the money expended to attract minorities and all of a sudden it is that policy which is being changed.

Is the policy being changed for the other categories of aid? It seems to me there is no justification for the two policies enunciated in the last couple of weeks, particularly from an Administration that says it fully endorses voluntary affirmative action: that wants to encourage educational opportunities for minorities and disadvantaged students.

How do they square support for affirmative action with their so-called idea of a color-blind society?

It would be nice if we had a color-blind society, but affirmative action obviously involves helping minorities.

It seems there is a contradiction. I can't read it any other way—I don't see how you can read it any other way. There are those who say they are worried about quotas and all that; that is a great statement, it sounds good, but it is rhetoric.

Ms. Byrd, if you really favor affirmative action, do you see that you can have affirmative action without in some way relating that back to race?

Ms. **Byrd**. No, I don't see any way. Affirmative action is designed to correct the race-specific history.

Chairman **Hawkins**. Past discrimination?

Ms. **Byrd**. Yes; of course.

Chairman **Hawkins**. If you support affirmative action, which means recognizing race, which Assistant Secretary Williams' statement does, I assume, on behalf of the Administration, then how can they say that it is wrong to have minority scholarships?

Ms. **Byrd**. Mr. Chairman, you are asking the same questions we asked when we read——

Chairman **Hawkins**. They endorsed affirmative action and then turn around and say it has to be done in a color-blind manner.

Well, the two are contradictory. That type of rhetoric is the thing that gets us in trouble.

I can't see any justification for moving in the way that the Administration has started.

It started down the wrong road and the Administration had better stop and reconsider what they are doing because this is an absolute change in policy.

They admit that themselves. How can a new policy be good one week and the next week it is changed again; it is different.

A policy was operating for nearly two decades and then they changed it.

Ms. **Byrd**. Mr. Williams, I believe, said yesterday at the press conference that the policy he announced last week which was a change in policy was a correct statement of the law and that the policy he announced yesterday which was a change in policy was also a correct statement of the law.

Chairman **Hawkins**. One has to be wrong.

Ms. **Byrd**. One would think so.

Chairman **Hawkins**. How is it that an unelected individual can so profoundly change public policy. It doesn't make sense. It is wrong.

If we are going to allow individuals to make policy, we are in serious trouble. We are going to have to get back to fundamentals if we are going to get ahead. I think this business of hiding behind technicalities is just a cop out.

It is most unfortunate that we don't have those most responsible for changing the policy here to be questioned.

If they can justify it, today would have been their opportunity to do so.

Ms. **Byrd**. Mr. Chairman, I think there absence tends to explain their inability or suggests their inability to explain this policy. It is indefensible. I think that is probably why they are not here today to attempt to explain it.

Chairman **Hawkins**. I don't see how they can attempt to explain it. You have put your finger on it. Because they cannot explain it publicly, they are not here today. They are going to use other press conferences to do it.

They are going to lead us into a decade of litigation in which they will encourage complaints to be made in order to carry out their policy of racism. That is what it is going to lead to.

I am not accusing the President. I am accusing some individuals in the Administration who are leading the President, in my opinion, down a very dangerous road, a road of meanness and evil in this country, that has to be somehow eliminated.

It is not going to be eliminated in the way that Mr. Williams enunciated in his so-called policy. He says that he is naive, if anyone believes that, they happen to be naive in my opinion. His is a well-thought out policy that emanates from certain individuals.

It must be eliminated if we are going to move ahead. Well, I want to thank you all.

Mr. Hayes, do you have a comment?

You and I have got to march again, I think.

Mr. HAYES. I am ready.

Mr. Chairman I don't have any questions.

I just want to say that the testimony has again benefited by some excellent testimony from this panel. I had a tough time getting here this morning from Chicago.

I look up there now and it is almost time for me to head back, but I have no regrets for having gotten up and rushed to the airport to come here. I wanted to be here because of the importance of the issue before us, number one.

And two, because reality tells me this is the last time I will have a chance to appear with you as Chairman of this committee. Your dedication, your conviction is one I know is going to be missed. Maybe we will have to get together in a picket line somewhere in order to make things turn around.

I am bothered by the direction in which we are going. I have often said the best defense this great Nation of ours could ever have is to make sure that our kids have an opportunity to get an education.

When you mention about decisions being made by people who are not necessarily elected officials, it is true. This is not the only true here. This is true overseas.

If you watch the trends of negotiating in trying to keep us out of war, you can see the people who are leading those kinds of discussions. Some of the people over there who will not have a chance to make a decision as to whether or not they will live or die are African-Americans.

They are willing to defend their country that they cannot even be educated in. Some of them are in the service because that was an opportunity for them to get ahead. I do hope that sanity will prevail before we begin to see if we can get this derailed train, so far as educational opportunities are concerned, back on track.

It is true that we are going in the wrong direction here. I just want to say in finality, Mr. Chairman, just because you are retiring doesn't mean you lose interest. I know that it is in your system.

You cannot escape it. I am going to be with you, work with you and do all you can.

I hope you can use all your influence to be sure that next year we talk about the number one bill coming before the Congress and it is going to be the new civil rights act.

I hope that comes in to fruition. I hope we can do something to make sure it is not destructive of this whole public educational system. We have traveled many places around the world, as you well know, and we have a lot of improving to do, not only at the post-secondary level but in the preschool level, the kindergarten level, elementary level, secondary level.

We find ourselves behind many other countries around the world. I would like to do what I can to work with others, people like you out there, the NAACP.

We have to keep our irons to the fire and keep pushing, fight for that which we know to be right and try to get people involved to fight for themselves. Destruction is occurring in our community. When I look at last weekend what happened in Chicago, I think it was 12 killed, some of them were high school students.

Some of them are leading the live of destruction. If we look at our prisons, the people in there, and measure the cost of people, to keep them in prison as against what it would cost to educate them and give them some incentive or a new way of life, I don't think there is even an argument there if you do it that way.

Thank you very much.

Mr. PETRI. Mr. Chairman, as a member of the minority in this particular context, may I say that you have been a very fine leader of our committee and I think a great role model for a lot of people and society and for the rest of us.

Chairman HAWKINS. I was going to pay a compliment to you.

You have been to my right, but you have had integrity. I have enjoyed your cooperation and I think the issue before us is in safe hands with individuals such as yourself.

Obviously, Mr. Hayes has always been there and he is going to carry on. This committee is in good shape.

May I thank the witnesses for very excellent testimony. I am sorry I was temporarily called away during some of the testimony.

We have heard your views. We appreciate them and we hope we will have your continuing cooperation, support and friendship.

That concludes the hearing.

Thank you.

[Whereupon, at 4:10 p.m., the committee adjourned.]

[Additional material submitted for the record follows.]

APPENDIX

UNITED STATES DEPARTMENT OF EDUCATION
THE SECRETARY

February 14, 1991

Hon. William Ford
Chairman
House Committee on Education and Labor
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman

This is in response to the letters from former Chairman Hawkins of December 18 and 27, 1990 and your letter of February 1, 1991 regarding the minority scholarships issue.

The Department shares the Education and Labor Committee's commitment to ensuring educational opportunity for all Americans, and we will work closely with you toward that end. With regard to your Committee's request for testimony by Assistant Secretary Michael Williams, we regret that he was unable to appear. However, having just formulated a new position on this issue the previous day, we did not believe that we had adequate preparation time for a proper presentation before your Committee.

As you are aware, at his confirmation hearing Secretary Designate Lamar Alexander indicated that upon taking office he "would start over... (w)e'll go back to the policy...that existed before December 4." In his hearing, Governor Alexander told the Senate Labor and Human Resources Committee that if confirmed, he would immediately begin a thorough review of this issue that would include consultation with Administration officials (including the Attorney General), Congress, and experts in the civil rights and higher education communities. I believe this statement by Secretary Designate Alexander should address most of your concerns with the earlier announced policy.

I am providing you with the documents requested in your earlier letters. The enclosed documents are being made available to the committee pursuant to 5 U.S.C. 552(d) for review in the exercise of the committee's oversight responsibilities. These include draft documents, advisory and legal memoranda that reflect the agency's internal deliberations and documents in open investigations. The Department does not authorize disclosure of these documents or any portion of them.

400 MARYLAND AVE., S.W. WASHINGTON, D.C. 20202-0100

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We are particularly concerned with safeguarding the confidentiality of the names of the complainant and witnesses in the investigations. Any improper release of such information could subject innocent persons to harm. The disclosure of files of active investigations may impede the timely completion of investigations and actually jeopardize successful voluntary compliance effort. Thus, the need for confidentiality concerning their contents by Members of the Committee and Committee staff is critical. I appreciate the assurances of confidentiality contained in your February 1 letter. I look forward to working with you on this and other education issues in the 102nd Congress.

Sincerely,

Ted Sanders

Ted Sanders
Acting Secretary

cc: Hon. Bill Goodling

Enclosures

Chronology of Office for Civil Rights Documents Relating to Race-Exclusive Scholarships

Since 1970, there have been a number of documents issued by the U.S. Department of Education's Office for Civil Rights (OCR) relating to the subject of race-exclusive scholarships.[1] The following are brief summaries of those documents (in chronological order).

1. National Merit Scholarships (December 1970) (OCR Director's response to inquiry from U.S. Representative Chalmers P. Wylie). Although OCR found that the subject of the inquiry--the National Merit Scholarship Service--was not a recipient, the letter went on to state the following:

> However, our office is aware that some institutions of higher education participating in Federal financial assistance programs have designated a small number of scholarships for minority group students, most often black. Scholarships of this type are in full accord with the objectives of Title VI if their purpose is to overcome the effects of past discrimination based on law or custom. I would note, however, that the appearance of minority group members in the institution's enrollment at some point may be such as to require the abandonment of the preference arrangement or its suitable modification.

2. Nondiscrimination in Federally Assisted Programs: Notice of Proposed Rulemaking (Notice), 36 FEDERAL REGISTER 23494 (December 9, 1971). This notice proposed the following addition to Section 80.3(b) of the HEW Title VI regulation (45 C.F.R. Part 80):

> (6) This regulation does not prohibit the consideration of race, color, or national origin if the purpose and effect are to remove or overcome the consequences of practices or impediments which have restricted the availability of, or participation in, the program or activity receiving Federal financial assistance, on the ground of race, color, or national origin. Where previous discriminatory practice or usage tends, on the ground of race, color, or national origin, to exclude individuals from participation in, to deny them the benefits of, or subject them to discrimination under any program or activity to which this

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[1] A "race-exclusive" scholarship is one that is limited to individuals of one or more racial or national origin groups, thereby excluding individuals of other races or national origin groups from being considered. A race-preference scholarship, on the other hand, merely treats the race of an individual as a plus factor in awarding a scholarship, with race being only one factor considered.

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> regulation applies, the applicant or recipient has an obligation to take reasonable action to remove or overcome the consequences of the prior discriminatory practice or usage, and to accomplish the purposes of the Act.

3. 1972 Summary of Requirements of Title VI for Institutions of Higher Education (June 1972) (attachment to a memorandum from the Director of OCR to presidents of institutions regarding required postsecondary compliance reports). This document states, in pertinent part, that:

> The awarding of scholarships and other financial aid administered by the institution must be free of discrimination on grounds of race, color, or national origin. Financial assistance includes both public and private scholarships, fellowships, student loans, traineeship stipends and employment obtained by the institution for the student as part of an assistance program; e.g., teaching assistantships, work-study programs. Student financial aid programs based on race or national origin may be consistent with Title VI if the purpose of such aid is to overcome the effects of past discrimination.

4. Part 100--Nondiscrimination Under Programs Receiving Federal Assistance through the Department of Education--Effectuation of Title VI of the Civil Rights Act of 1964 (Final Rulemaking), 45 FEDERAL REGISTER 30918 (May 9, 1980), 34 C.F.R. Part 100. This notice adopted the HEW Title VI regulation (45 C.F.R. Part 80), which had been amended at 38 FEDERAL REGISTER 17978 (July 5, 1973) by adding the following text as Section 80.3(b):

> (i) In administering a program regarding which the recipient has previously discriminated against persons on the ground of race, color, or national origin, the recipient must take affirmative action to overcome the effects of prior discrimination.
>
> (ii) Even in the absence of such prior discrimination, a recipient, in administering a program, may take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color, or national origin.

5. Implications of Bakke (October 27, 1978) (memo from HEW's Assistant General Counsel of the Civil Rights Division to OCR Director David Tatel).

NOT SUBJECT TO DISCLOSURE

6. Guidelines for Eliminating Discrimination and Denial of Services on the Basis of Race, Color, National Origin, Sex and Handicap in Vocational Education Programs (Guidelines), 44 FEDERAL REGISTER 17162 (March 21, 1979) (they also appear at Appendix B of the Title VI implementing regulation---34 C.F.R. Part 100). The Guidelines specifically prohibit recipients who operate vocational educational programs from awarding financial aid on the basis of race absent a finding of past discrimination. In pertinent part, the Guidelines provide that:

> Recipients may not award financial assistance in the form of loans, grants, scholarships, special funds, subsidies, compensation for work, or prizes to vocational education students on the basis of race, color national origin, sex, or handicap, except to overcome the effects of past discrimination.

Section VI. B. Note that the "except" clause of this section of the Guidelines uses the language of 34 C.F.R. § 100.3(b)(6)(i), which addresses mandatory affirmative action, rather than the broader language of 34 C.F.R. § 100.3(b)(6)(ii), which addresses voluntary affirmative action. The Guidelines went through formal rulemaking procedures, i.e., notice to the public, an opportunity for interested persons to submit comments, consideration of those comments, and publication in final in the Federal Register.

7. Impact of Bakke Decision on HEW Programs and Policies (April 1979) (HEW Office of the General Counsel memorandum).

NOT SUBJECT TO DISCLOSURE

8. NIMH-APA Minority Fellowship Program (July 10, 1979) (Memorandum from the Office of Legal Counsel to an OCR Division Director).

NOT SUBJECT TO DISCLOSURE

9. Nondiscrimination in Federally Assisted Programs; Title VI of the Civil Rights Act of 1964; Policy Interpretation, 44 FEDERAL REGISTER 58509 (October 10, 1979) The Policy Interpretation defines the scope of permissible voluntary affirmative action by higher education institutions who are recipients of Federal funding. Although financial aid is not one of the specific examples used, the Policy Interpretation concludes that, in light of Bakke, students could not be excluded from services on the basis of race, color, or national origin.

10. Massachusetts Institute of Technology OCR Case No. 01-80-2046 (March 24, 1982) (denial of a complainant's appeal). This case involved a challenge to a race-exclusive Minority Tuition Fellowship program. In its appeal response letter to the complainant, an OCR division director stated that it was improper to extend the Bakke decision from admissions to all race-conscious actions by universities, and that a pre-Bakke U.S. District Court case (Flanagan v. President and Directors of Georgetown College, 417 F. Supp. 377 (D.D.C. 1976)) that applied principles such as those in Bakke to strike down a race-conscious student financial aid program was not controlling because it was inconsistent with subsequent Supreme Court affirmative action decisions. The rationale for the refusal to extend Bakke to other race-conscious university programs was as follows:

> Admissions quotas, the policy at issue in Bakke, unlike many other policies, may result in the exclusion of an individual from a university on the basis of race or national origin. The availability of a particular financial aid program does not have such a far-reaching effect.

11. University of Denver, OCR Case No. 08-83-6001 (March 22, 1983) (policy memorandum to Region VIII from the Deputy Assistant Secretary). OCR concluded that three race-exclusive minority fellowship programs (one established by Congress and two established by private entities) administered by the institution were permissible, stating that "[w]e do not believe that Bakke is controlling as to the award of student financial

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aid, as the decision addresses issues relating only to admissions." The memorandum states that the fellowship programs do not exclude non-minority applicants from admission on the basis of race, and that non-minority students may still qualify for seven other funding sources.

12. Dutch American Scholarships (May 2, 1986) (response letter to a Dutch American organization from the Acting Assistant Secretary). In providing informal advice concerning the permissibility of scholarships provided by a Dutch American organization, OCR reaffirmed the applicability of the Bakke case to financial aid, and added: "I am not aware that Dutch Americans have been discriminated against or limited in their participation in federally financed programs."

13. Southwest Missouri State University (December 3, 1986) (Regional Office response to request for technical assistance). In assessing the permissibility of a proposed race-preference scholarship program at the university, OCR found that there was insufficient evidence to make a determination under either 34 C.F.R. § 100.3(b)(6)(i) or (ii), or under section VI. B. of the Guidelines (see quote of this section of the Guidelines in item number two supra), because there was neither evidence of past discrimination by the university nor evidence of previous conditions at the university that limited the participation of minorities in university programs. The Regional Office quoted the Guidelines language stating that institutions could only award scholarships based on race to overcome the effects of past discrimination.

14. Dartmouth College (March 17, 1988) (Regional Office response to request for technical assistance). This case involved a proposed, privately-funded, race-exclusive scholarship program. OCR recommended that the college not set up a race-restricted scholarship, and that the approach be changed to a program "weighted toward academic excellence, demonstrated financial need, and leadership potential."

15. David Lipscomb University, OCR Case No. 04-89-2021 (May 4, 1989) (letter of findings). This case involves two university-administered scholarships restricted to black students and one restricted to white students. In the past, blacks had been barred from attending the university. Another school had been established as an alternative for black students to attend. This school was sold in the 1960's and the proceeds of the sale were used to establish the two scholarships for black students. OCR found that the two scholarships for black students were permissible affirmative action under 34 C.F.R. § 100.3(b)(6)(i) because they were established to overcome the effects of prior discrimination by the university. Conversely, OCR found that the scholarship for white students was impermissible under 34 C.F.R. § 100.3(b)(6)(i) because the university had not discriminated against whites, and impermissible under 34 C.F.R. § 100.3(b)(6)(ii) because conditions at the university had not resulted in limited participation by whites.

16. University of Colorado, OCR Case No. 08-89-2024 (September 28, 1989) (letter of findings). This case involves an allegation by a white female of discrimination in the university's administration of the Patricia Roberts Harris Fellowship program--a program established by the U.S. Congress to provide postgraduate financial aid for needy individuals from groups that are traditionally underrepresented in graduate and professional programs. The university limited eligibility for these fellowships to Blacks, Hispanics, and American Indians. The limitation was based on historical enrollment data indicating that, while the included groups were traditionally underrepresented in the university's School of Medicine, white females were not. The university identified the high cost of matriculation as the condition that limited participation by these groups in the School of Medicine. OCR found that the university's limitation of these scholarships by race was permissible.

Chalmers P. Wylie
Congress of the United States
House of Representatives
Washington, D.C. 20515

Dear Congressman Wylie:

Thank you for your recent inquiry on behalf of your constituent, Mr. [redacted], regarding his allegation of discrimination in the award of scholarships by the National Merit Scholarship Service.

As you know, the Office for Civil Rights administers Title VI of the Civil Rights Act of 1964 which requires that recipients of Federal financial assistance offer their benefits and services without regard to race, color, or national origin. The National Merit Scholarship Service does not participate in Federal financial assistance programs and, therefore, is not subject to this requirement.

However, our Office is aware that some institutions of higher education participating in Federal financial assistance programs have designated a small number of scholarships for minority group students, most often black. Scholarships of this type are in full accord with the objectives of Title VI if their purpose is to overcome the effects of past discrimination based on law or custom. I would note, however, that the appearance of minority group members in the institution's enrollment at some point may be such as to require the abandonment of the preference arrangement or its suitable modification.

If I can be of any further assistance, please let me know.

Sincerely yours,

J. Stanley Pottinger
Director, Office for Civil Rights

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federal register

THURSDAY, DECEMBER 9, 1971
WASHINGTON, D.C.
Volume 36 ■ Number 237

THE NATIONAL ARCHIVES OF THE UNITED STATES • 1934 •

PART II

Nondiscrimination in Federally Assisted Programs

■

Notice of Proposed Rule Making

NONDISCRIMINATION IN FEDERALLY ASSISTED PROGRAMS

Notice of Proposed Rule Making

Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d to d–4, prohibits discrimination on the ground of race, color, or national origin, in programs which receive Federal financial assistance. Twenty Federal agencies, which have regulations implementing title VI, are proposing amendments to their regulations in accordance with recommendations of an interagency committee. One agency is proposing its initial regulation.

Due to the subject matter of the regulations, there is no statutory requirement of publication in the FEDERAL REGISTER as proposed rule making. See 5 U.S.C. 533(a). It has been decided, however, that the public should have an opportunity to comment on the amendments.[1]

Under Executive Order 11247, the Attorney General has responsibility for coordinating the enforcement of title VI. Accordingly, the Department of Justice is publishing the amendments on behalf of the other departments and agencies. The amendments of the following agencies are published below: The Departments of Agriculture; Commerce; Defense; Health, Education, and Welfare; Housing and Urban Development; Interior; Justice; Labor; and State; and the Agency for International Development; Atomic Energy Commission; Civil Aeronautics Board; General Services Administration; National Aeronautics and Space Administration; National Science Foundation; Office of Economic Opportunity; Office of Emergency Preparedness; Small Business Administration; Tennessee Valley Authority and Veterans Administration.[2] Also published below is the initial title VI regulation of the National Foundation on the Arts and the Humanities.

Interested persons may participate in the consideration of the proposals by submitting written comments. Communications should be submitted in triplicate to the Assistant Attorney General, Civil Rights Division, Department of Justice, Washington, D.C. 20530. All communications received within 30 days after publication of this notice in the FEDERAL REGISTER will be considered.

After comments have been received and analysed, and any necessary changes have been made, the amendments and the regulation will be submitted to the President for approval in accordance with section 602 of title VI, 42 U.S.C. 2000d–1. The amendments and the regulation will take effect upon publication in the FEDERAL REGISTER after approval by the President.

The most important of the proposed uniform amendments involve:

(1) Specifying that the sites of facilities of federally assisted programs may not be selected with the purpose or effect of discrimination, on the ground of race, color, or national origin, against beneficiaries;

(2) Requiring affirmative action to overcome the effects of past discrimination;

(3) Providing that discriminatory employment practices are prohibited by title VI to the extent that such practices tend to cause discrimination in the services provided beneficiaries.

DEPARTMENT OF AGRICULTURE

Office of the Secretary

[7 CFR Part 15]

NONDISCRIMINATION IN FEDERALLY ASSISTED PROGRAMS

Notice of Proposed Rule Making

The following proposed amendments to 7 CFR, Subtitle A, Part 15, Subpart A, primarily represent uniform revisions being jointly adopted by the various Departments and Agencies of the U.S. Government to put into effect clarifications to the regulations issued pursuant to title VI of the Civil Rights Act of 1964.

Title 7, CFR, Subtitle A, Part 15, Subpart A, is hereby amended as follows:

1. Section 15.1(a) is amended by inserting the language "of an applicant or recipient" immediately following the words "under any program or activity" so that the phrase reads "under any program or activity of an applicant or recipient receiving Federal financial assistance from the Department of Agriculture or any Agency thereof."

2. Section 15.1(b) is amended to read as follows:

(b) The regulations in this part apply to any program or activity of an applicant or recipient for which Federal financial assistance is authorized under a law administered by the Department including, but not limited to, the Federal financial assistance listed in the appendix to this part. They apply to money paid, property transferred, or other Federal financial assistance extended to an applicant or recipient for its program or activity after the effective date of these regulations pursuant to an application approved or statutory or other provision made therefor prior to such effective date. The regulations in this part do not apply to (1) any Federal financial assistance by way of insurance or guaranty contract, (2) money paid, property transferred, or other assistance extended prior to the effective date of the regulations in this part, (3) any assistance to an applicant or recipient who is an ultimate beneficiary under any such [illegible] gram, or (4) except as provided in § [illegible] (c), any employment practice of any [illegible] ployer, employment agency or labor [illegible] ganization. The fact that a specific [illegible] of Federal financial assistance is [illegible] listed in the appendix, shall not [illegible] if title VI of the Act is otherwise app[illegible] cable, that such Federal financial [illegible] ance is not covered. Other Federal [illegible] cial assistance under statutes now [illegible] force or hereinafter enacted may [illegible] added to this list by notice approved [illegible] issued by the Secretary and publish[illegible] the FEDERAL REGISTER.

3. Section 15.2(d) is amended to [illegible] as follows:

(d) "Hearing Officer" means a h[illegible] ing examiner appointed pursuant to [illegible] U.S.C. 3105, and designated to hold [illegible] ings under the regulations in this [illegible] or any person authorized to hold a [illegible] ing and make a final decision under [illegible] regulations in this part.

4. Section 15.3(a) is amended by [illegible] serting the language "or activity of [illegible] applicant or recipient" immediately fol[illegible] lowing the language "under any pro[illegible] gram" so that the phrase reads "[illegible] any program or activity of the applicant or recipient to which these regulations apply."

5. Section 15.3(b) is amended by inserting a new subparagraph (3) reading as follows:

(3) In determining the site or location of facilities, an applicant or recipient may not make selections with the purpose or effect of excluding individuals from, denying them the benefits of, or subjecting them to discrimination under any of its activities or programs to which the regulations in this part apply, on the grounds of race, color, or national origin; or with the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the Act and these regulations.

6. Section 15.3(b), subparagraphs (3) and (4), are renumbered (4) and (5) respectively, and the renumbered subparagraph (4) is amended to read as follows:

(4) As used in this section the services, financial aid, or other benefits provided under a program or activity of an applicant or recipient receiving Federal financial assistance shall be deemed to include any and all services, financial aid, or other benefit provided in or through a facility provided or improved in whole or part with the aid of Federal financial assistance.

7. Section 15.3(b) is further amended by adding the following new subparagraph (6) at the end thereof

(6) These regulations do not [illegible] the consideration of race, color, [illegible] tional origin if the purpose and effect are to remove or overcome [illegible] quences of practices or [illegible] which have restricted the availab[illegible] or participation in, the pro[illegible] tivity of the applicant or [illegible] ceiving Federal financial as[illegible] the grounds of race, color [illegible] origin. Where previous [illegible]

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[1] In the past, title VI regulations and amendments to them have not been published as proposed rule making. With the exception of two departments, the amendments were adopted by the departments and agencies before the decision was made to publish them for comment. Accordingly, the preambles of the various amendments do not indicate that the proposed rule making procedure is being followed.

[2] Five agencies are completely reissuing their title VI regulations. They are: The Departments of Commerce; Defense; and Housing and Urban Development; the Office of Economic Opportunity; and the Office of Emergency Preparedness.

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compliance with this part and provides reasonable assurance that it will fully comply with this part.

(2) Any applicant or recipient adversely affected by an order entered pursuant to paragraph (g) of this section may at any time request the Secretary to restore fully its eligibility to receive Federal finance assistance.

(3) If the Secretary denies any such request, the applicant or recipient may submit to the Secretary a request for a hearing in writing, specifying why it believes the Secretary to have been in error. It shall thereupon be given an expeditious hearing, with a decision on the record in accordance with the procedures set forth in Part 17A of this title. The applicant or recipient shall be restored to such eligibility if it proves at such a hearing that it satisfied the requirements of subparagraph (1) of this paragraph.

(4) While proceedings under this paragraph are pending, the sanctions imposed by the order issued under paragraph (g) of this section shall remain in effect.

§ 17.11 [Amended]

18. Subparagraph (1) in the second sentence of paragraph (a) of § 17.11 is amended to read, "(1) Executive Orders 10925, 11114, and 11246 and regulations issued thereunder."

19. In paragraph (b) of § 17.11, the phrase "The Secretary or his designee" is substituted for the phrase "the head of each bureau and office administering Federal financial assistance."

20. Paragraph (c) of § 17.11 is revised by addition of the following as a final sentence: "Any action taken, determination made or requirement imposed by an official of another department or agency acting pursuant to an assignment of responsibility under this paragraph shall have the same effect as though such action had been taken by the Secretary of this Department."

21. Section 17.12 is revised by amending paragraph (c) and adding paragraph (k) to read as follows:

§ 17.12 Definitions.

* * * * *

(c) The term "Secretary" means the Secretary of the Interior or, except in § 17.9(f) any person to whom he has delegated his authority in the matter concerned.

* * * * *

(k) The term "Office of Hearings and Appeals" refers to a constituent office of the Department established July 1, 1970. 35 F.R. 12081 (1970).

22. In Appendix A, part I, item 7 is deleted and items 8 through 21 are redesignated as items 7 through 20.

23. In Appendix A, part III, item 3 is added to read as follows:

3. Sealing and filling of voids in abandoned coal mines, reclamation of surface mine areas, and extinguishing mine fires (79 Stat. 13, as amended, 40 U.S.C. sec. 205).

24. In paragraph (a) of part IV in Appendix A, the heading is amended and items 5 and 7 are revised to read as follows:

(a) Grants of Federal Funds.

* * * * *

5. Anadromous Fish Act of 1965 (79 Stat. 1125, 16 U.S.C. secs. 757a–757f).

* * * * *

7. Jellyfish Act of 1966 (80 Stat. 1142, 16 U.S.C. secs. 1201–1205).

25. Items 2 and 3 are deleted from paragraph (b) of part IV in Appendix A and items 4 through 6 are redesignated as items 2 through 4.

26. Items 1, 4 and 5 are deleted from paragraph (c) of part IV in Appendix A and items 2, 3, and 6 are redesignated as items 1, 2 and 3.

27. Item 3 in paragraph (a) of section V in Appendix A is revised and item 9 is added in the same paragraph, to read as follows:

3. Historic Preservation Act of 1966 (80 Stat. 915, 16 U.S.C. sec. 47a).

* * * * *

9. Outdoor Recreation Programs (78 Stat. 897, as amended, 16 U.S.C. secs. 4601-4—4601-11).

28. Any rule, order, policy, guideline, finding, determination, authorization, requirement, designation or other action prescribed, issued or taken before the effective date of these amendments under Part 17 shall have the same effect as if these amendments to Part 17 had not been made. No administrative proceeding shall abate by reasons of the taking effect of these amendments. Administrative proceedings initiated under Part 17 prior to these amendments and not finally disposed of prior to such effective date shall be governed by the provisions of Part 17 as amended. If any case under Part 17 where a hearing examiner had rendered an initial or recommended decision, the case shall be concluded in accordance with the provisions of Part 17 as amended.

FRED J. RUSSELL,
Acting Secretary of the Interior.

December 3, 1971.

[FR Doc.71-17886 Filed 12-8-71;8:46 am]

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

Office of the Secretary

[45 CFR Part 80]

NONDISCRIMINATION IN FEDERALLY ASSISTED PROGRAMS

Notice of Proposed Rule Making

Amendments to 45 CFR Part 80 are proposed for the purposes indicated below. Revisions similar to those described below (except for revisions described in items numbered 6–8) are uniform changes being adopted by other agencies which provide Federal financials assistance, pursuant to title VI of the Civil Rights Act of 1964. The revisions described under items 6–8 below are not uniform; they are procedural in nature and designed for the regulation of this agency only. In addition, citations to statutory authority are added immediately after each section of 45 CFR Part 80.

1. The present subparagraphs (3) and (4) of § 80.3(b) are renumbered (4) and (5), respectively, and a new subparagraph (3) is added to clarify nondiscrimination requirements with respect to the selection of sites and locations for facilities which affect the provision of federally assisted benefits.

2. A new § 80.3(b)(6) is added to specify that affirmative steps to make services more equitably available are not prohibited and that such steps are required when necessary to overcome the consequences of prior discrimination. Illustrative applications are added as § 80.5 (i) and (j).

3. A subparagraph is added to § 80.3(c) to state the rule concerning discriminatory employment practices which result in excluding individuals from participation in, denying them the benefits of, or subjecting them to discrimination under any program or activity to which this regulation applies.

4. Section 80.4(a)(2) is revised to delete the requirement that surplus property transfers contain a reverter for breach of the nondiscrimination provisions and instead to authorize a reverter discretionary with the responsible department official in the case of any real property transfer. As revised, a covenant running with the land, to assure nondiscriminatory use, will be included when any Federal financial assistance is extended in the form of a transfer of real property by the Federal Government. In other cases where property is acquired or improved with Federal financial assistance, the amendment requires that the recipient [illegible] to include such a convenant in any subsequent transfer.

5. Language of § 80.4(b) which provided that noncomplying features of existing continuing State programs could be corrected in the future has been deleted. These programs have now had ample time to achieve full compliance under the Act.

6. Section 80.9(a) provided that in the case of a waiver of a right to a hearing the decision may be made on the basis of "such information as is available." This is amended to provide that the decision in such a case may be made on the basis of "such information as may be filed as the record."

7. Under § 80.10, prior to the [illegible] amendment, a party to a proceeding could request the Secretary to [illegible] hearing examiner's decision even [illegible] there was no request for the [illegible] review of the Reviewing [illegible] which is a matter of right. The amendment to § 80.10(c) authorizes [illegible] for review by the Secretary [illegible] matter has first been considered [illegible] Reviewing Authority.

8. Subparagraph (4) of § 80.[illegible] duplicates the provision of the last [illegible] of subparagraph (3) of such [illegible]. Subparagraph (4) is deleted to [illegible] that inadvertent duplication

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A sentence is added to § 80.12(c) -ifying that actions taken by an of- -ial of another Department or Agency -der an assignment of responsibility -ll have the same effect as though -en by the responsible official of this -partment.

10. In some provisions the word "program" has been used to refer to the arrangement under which Federal financial assistance is made available; in other places it was used to mean the operation or activity of the applicant or recipient. Technical revisions are made in the designation of Part 80 and throughout the regulation to eliminate the use of "program" to refer to the arrangement under which Federal financial assistance is made available.

11. Clause 3 is added to § 80.12(a) to make clear that these regulations and amendments will not affect the requirements for Emergency School Assistance as published in 36 F.R. 13442 and codified as 45 CFR Part 181.

12. The listing of Appendix A is revised to eliminate the use of "program" to refer to the arrangement under which Federal financial assistance is made available and to bring the listings in the Appendix up to date.

1. The designation of Part 80 is amended to read:

PART 80—NONDISCRIMINATION UNDER PROGRAMS RECEIVING FEDERAL FINANCIAL ASSISTANCE THROUGH THE DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE—EFFECTUATION OF TITLE VI OF THE CIVIL RIGHTS ACT OF 1964

2. Section 80.2 is amended to read:

§ 80.2 Application of this regulation.

This regulation applies to any program for which Federal financial assistance is authorized to be extended to a recipient under a law administered by the Department, including the Federal assistance programs and activities listed in Appendix A of this regulation. It applies to money paid, property transferred, or other Federal financial assistance extended after the effective date of the regulation pursuant to an application approved prior to such effective date. This regulation does not apply to (a) any Federal financial assistance by way of insurance or guaranty contracts, (b) money paid, property transferred, or other assistance extended before the effective date of this regulation, (c) the use of any assistance by any individual who is the ultimate beneficiary under any such program, or (d) any employment practice, under any such program, of any employer, employment agency, or labor organization, except to the extent described in § 80.3. The fact that a type of Federal assistance is not listed in Appendix A shall not mean, if title VI of the Act is otherwise applicable, that a program is not covered. Federal financial assistance under statutes now in force or hereinafter enacted may be added to this list by notice published in the FEDERAL REGISTER.

(Secs. 602, 604, Civil Rights Act of 1964; 78 Stat. 252, 253; 42 U.S.C. 2000d-1, 2000d-3)

§ 80.3 [Amended]

3. Section 80.3(b) is amended by renumbering the present subparagraphs (3) and (4), as subparagraphs (4) and (5), respectively, and adding new subparagraphs (3) and (6). As so changed, subparagraphs (3), (4), (5), and (6) read as follows:

(3) In determining the site or location of facilities, an applicant or recipient may not make selections with the effect of excluding individuals from, denying them the benefits of, or subjecting them to discrimination under any programs to which this regulation applies, on the ground of race, color, or national origin; or with the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the Act or this regulation.

(4) As used in this section, the services, financial aid, or other benefits provided under a program receiving Federal financial assistance shall be deemed to include any service, financial aid, or other benefit provided in or through a facility provided with the aid of Federal financial assistance.

(5) The enumeration of specific forms of prohibited discrimination in this paragraph and paragraph (c) of this section does not limit the generality of the prohibition in paragraph (a) of this section.

(6) This regulation does not prohibit the consideration of race, color, or national origin if the purpose and effect are to remove or overcome the consequences of practices or impediments which have restricted the availability of, or participation in, the program or activity receiving Federal financial assistance, on the ground of race, color, or national origin. Where previous discriminatory practice or usage tends, on the ground of race, color, or national origin, to exclude individuals from participation in, to deny them the benefits of, or to subject them to discrimination under any program or activity to which this regulation applies, the applicant or recipient has an obligation to take reasonable action to remove or overcome the consequences of the prior discriminatory practice or usage, and to accomplish the purposes of the Act.

4. Paragraphs (c) and (d) of § 80.3 are amended to read:

(c) *Employment practices.* (1) Where a primary objective of the Federal financial assistance to a program to which this regulation applies is to provide employment, a recipient may not (directly or through contractual or other arrangements) subject an individual to discrimination on the ground of race, color, or national origin in its employment practices under such program (including recruitment or recruitment advertising, employment, layoff or termination, upgrading, demotion, or transfer, rates of pay or other forms of compensation, and use of facilities), including programs where a primary objective of the Federal financial assistance is (i) to reduce the unemployment of such individuals or to keep them through employment to meet subsistence needs, (ii) to assist such individuals through employment to meet expenses incident to the commencement or continuation of their education or training, (iii) to provide work experience which contributes to the education or training of such individuals, or (iv) to provide remunerative activity to such individuals who because of severe handicaps cannot be readily absorbed in the competitive labor market. The following, under existing laws, have one of the above objectives as a primary objective:

(a) Projects under the Public Works Acceleration Act, Public Law 87-658, 42 U.S.C. 2641-2643.

(b) Community work and training assisted under title IV of the Social Security Act, 42 U.S.C. 609.

(c) Work-study under the Vocational Education Act of 1963, as amended, 20 U.S.C. 1371-1376.

(d) Programs assisted under laws listed in Appendix A as respects employment opportunities provided thereunder, or in facilities provided thereunder, which are limited, or for which preference is given, to students, fellows, or other persons in training for the same or related employments.

(e) Assistance to sheltered workshops under the Vocational Rehabilitation Act, 29 U.S.C. 32-34, 41a and 41b.

(2) The requirements applicable to construction employment under any such program shall be those specified in or pursuant to Part III of Executive Order 11246 or any Executive order which supersedes it.

(3) Where a primary objective of the Federal financial assistance is not to provide employment, but discrimination on the ground of race, color, or national origin in the employment practices of the recipient or other persons subject to the regulation tends, on the ground of race, color, or national origin, to exclude individuals from participation in, to deny them the benefits of, or to subject them to discrimination under any program to which this regulation applies, the foregoing provisions of this paragraph (c) shall apply to the employment practices of the recipient or other persons subject to the regulation, to the extent necessary to assure equality of opportunity to, and nondiscriminatory treatment of, beneficiaries.

(d) *Indian Health and Cuban Refugee Services.* An individual shall not be deemed subjected to discrimination by reason of his exclusion from the benefits of a program limited by Federal law to individuals of a particular race, color, or national origin different from his.

§ 80.4 [Amended]

5. Subparagraph (2) of § 80.4 is amended to read:

(2) Where Federal financial assistance is provided in the form of a transfer of real property or interest therein from the Federal Government, the instrument effecting or recording the transfer shall contain a covenant running with the land to assure nondiscrimination for the period during which the real property is used for a [illegible]

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for which the Federal financial assistance is extended or for another purpose involving the provision of similar services or benefits. Where no transfer of property is involved but property is improved with Federal financial assistance, the recipient shall agree to include such a convenant to any subsequent transfer of the property. Where the property is obtained from the Federal Government, such convenant may also include a condition coupled with a right to be reserved by the Department to revert title to the property in the event of a breach of the covenant where, in the discretion of the responsible Department official, such a condition and right of reverter is appropriate to the statute under which the real property is obtained and to the nature of the grant and the grantee. In the event a transferee of real property proposes to mortgage or otherwise encumber the real property as security for financing construction of new, or improvement of existing, facilities on such property for the purposes for which the property was transferred, the responsible Department official may agree, upon request of the transferee and if necessary to accomplish such financing, and upon such conditions as he deems appropriate, to forbear the exercise of such right to revert title for so long as the lien of such mortgage or other encumbrance remains effective.

6. Paragraph (b) of § 80.4 is amended to read:

(b) *Continuing State programs.* Every application by a State or a State agency to carry out a program involving continuing Federal financial assistance to which this regulation applies (including the Federal financial assistance listed in Part 2 of Appendix A) shall as a condition to its approval and the extension of any Federal financial assistance pursuant to the application (1) contain or be accompanied by a statement that the program is (or, in the case of a new program, will be) conducted in compliance with all requirements imposed by or pursuant to this regulation, and (2) provide or be accompanied by provision for such methods of administration for the program as are found by the responsible department official to give reasonable assurance that the applicant and all recipients of Federal financial assistance under such program will comply with all requirements imposed by or pursuant to this regulation.

7. Subparagraph (1) of § 80.4(d) is amended to read:

(d) *Assurances from institutions.* (1) In the case of any application for Federal financial assistance to an institution of higher education (including assistance for construction, for research, for special training project, for student loans or for any other purpose), the assurance required by this section shall extend to admission practices and to all other practices relating to the treatment of students.

8. The introductory statement of § 80.5 and paragraphs (a), (b), (e), and (h) are amended and paragraphs (i) and (j) are added as illustrative applications of the new § 80.3(b)(6) to read:

§ 80.5 Illustrative applications.

The following examples will illustrate the application of the foregoing provisions to some programs aided by Federal financial assistance of the Department. (In all cases the discrimination prohibited is discrimination on the ground of race, color, or national origin prohibited by title VI of the Act and this regulation, as a condition of the receipt of Federal financial assistance.)

(a) In federally assisted programs for the provision of health or welfare services, discrimination in the selection or eligibility of individuals to receive the services, and segregation or other discriminatory practices in the manner of providing them, are prohibited. This prohibition extends to all facilities and services provided by the grantee under the program or, if the grantee is a State, by a political subdivision of the State. It extends also to services purchased or otherwise obtained by the grantee (or political subdivision) from hospitals, nursing homes, schools, and similar institutions for beneficiaries of the program, and to the facilities in which such services are provided, subject, however, to the provisions of § 80.3(e).

(b) In federally affected area assistance (Public Law 815 and Public Law 874) for construction aid and for general support of the operation of elementary or secondary schools, or in more limited support to such schools such as for the acquisition of equipment, the provision of vocational education, or the provision of guidance and counseling services, discrimination by the recipient school district in any of its elementary or secondary schools in the admission of students, or in the treatment of its students in any aspect of the educational process, is prohibited. In this and the following illustrations the prohibition of discrimination in the treatment of students or other trainees includes the prohibition of discrimination among the students or trainees in the availability or use of any academic, dormitory, eating, recreational, or other facilities of the grantee or other recipient.

* * * * *

(e) In grants to assist in the construction of facilities for the provision of health, educational, or welfare services, assurances will be required that services will be provided without discrimination, to the same extent that discrimination would be prohibited as a condition of Federal operating grants for the support of such services. Thus, as a condition of grants for the construction of academic, research, or other facilities at institutions of higher education, assurances will be required that there will be no discrimination in the admission or treatment of students. In case of hospital construction grants the assurance will apply to patients, to interns, residents, student nurses, and other trainees, and ot the privilege of physicians, dentists, and other professionally qualified persons to practice in the hospital, and will apply to the entire facility for which, or for a part of which, the grant is made, and to facilities operated in connection therewith. In other construction grants the assurances required will similarly be adapted to the nature of the activities to be conducted in the facilities for construction of which the grants have been authorized by Congress.

* * * * *

(h) A recipient may not take action that is calculated to bring about indirectly what this regulation forbids it to accomplish directly. Thus, a State, in selecting or approving projects or sites for the construction of public libraries which will receive Federal financial assistance, may not base its selections or approvals on criteria which have the effect of defeating or of substantially impairing accomplishment of the objectives of the Federal assistance as respects individuals of a particular race, color, or national origin.

(i) In some situations, even though past discriminatory practices attributable to a recipient or applicant have been abandoned, the consequences of such practices continue to impede the full availability of a benefit. If the efforts require of the applicant or recipient under § 80.6(d), to provide information as to the availability of the program or activity and the rights of beneficiaries under this regulation, have failed to overcome these consequences, it will become necessary under the requirement stated in the second sentence of § 80.3 (b)(6) for such applicant or recipient to take additional steps to make the benefits fully available to racial and nationality groups previously subjected to discrimination. This action might take the form, for example, or special arrangements for obtaining referrals or making selections which will insure that groups previously subjected to discrimination are adequately served.

(j) Even though an applicant or recipient has never used discriminatory policies, the services and benefits of the program or activity it administers may not in fact be equally available to some racial or nationality groups. In such circumstances, an applicant or recipient may properly give special consideration to race, color, or national origin to make the benefits of its program more widely available to such groups, not then being adequately served. For example, where a university is not adequately serving members of a particular racial or nationality group, it may establish special recruitment policies to make its program better known and more readily available to such group, and take other steps to provide that group with more adequate service.

§ 80.6 [Amended]

9. Paragraph (d) of § 80.6 is amended to read:

(d) *Information to beneficiaries and participants.* Each recipient shall make available to participants, beneficiaries,

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and other interested persons such information regarding the provisions of this regulation and its applicability to the program for which the recipient receives Federal financial assistance, and make such information available to them in such manner, as the responsible Department official finds necessary to apprise such persons of the protections against discrimination assured them by the Act and this regulation.

10. Paragraph (a) of § 80.9 is amended to read:

§ 80.9 Hearings.

(a) *Opportunity for hearing.* Whenever an opportunity for a hearing is required by § 80.8(c), reasonable notice shall be given by registered or certified mail, return receipt requested, to the affected applicant or recipient. This notice shall advise the applicant or recipient of the action proposed to be taken, the specific provision under which the proposed action against it is to be taken, and the matters of fact or law asserted as the basis for this action, and either (1) fix a date not less than 20 days after the date of such notice within which the applicant or recipient may request of the responsible Department official that the matter be scheduled for hearing or (2) advise the applicant or recipient that the matter in question has been set down for hearing at a stated place and time. The time and place so fixed shall be reasonable and shall be subject to change for cause. The complainant, if any, shall be advised of the time and place of the hearing. An applicant or recipient may waive a hearing and submit written information and argument for the record. The failure of an applicant or recipient to request a hearing under this paragraph or to appear at a hearing for which a date has been set shall be deemed to be a waiver of the right to a hearing under section 602 of the Act and § 80.8(c) of this regulation and consent to the making of a decision on the basis of such information as may be filed as the record.

* * * * *

§ 80.10 [Amended]

11. Paragraphs (e) and (f) of § 80.10 are amended to read:

(e) *Review in certain cases by the Secretary.* If the Secretary has not personally made the final decision referred to in paragraphs (a), (b), or (c) of this section, a recipient or applicant or the counsel for the Department may request the Secretary to review a decision of the Reviewing Authority in accordance with rules of procedure issued by the responsible Department official. Such review is not a matter of right and shall be granted only where the Secretary determines there are special and important reasons therefor. The Secretary may grant or deny such request, in whole or in part. He may also review such a decision upon his own motion in accordance with rules of procedure issued by the responsible Department official. In the absence of a review under this paragraph, a final decision referred to in paragraphs (a), (b), or (c) of this section shall become the final decision of the Department when the Secretary transmits it as such to Congressional committees with the report required under section 602 of the Act. Failure of an applicant or recipient to file an exception with the Reviewing Authority or to request review under this paragraph shall not be deemed a failure to exhaust administrative remedies for the purpose of obtaining judicial review.

(f) *Content of orders.* The final decision may provide for suspension or termination of, or refusal to grant or continue Federal financial assistance, in whole or in part, to which this regulation applies, and may contain such terms, conditions, and other provisions as are consistent with and will effectuate the purposes of the Act and this regulation, including provisions designed to assure that no Federal financial assistance to which this regulation applies will thereafter be extended under such law or laws to the applicant or recipient determined by such decision to be in default in its performance of an assurance given by it pursuant to this regulation, or to have otherwise failed to comply with this regulation, unless and until it corrects its noncompliance and satisfies the responsible Department official that it will fully comply with this regulation.

12. Subparagraph (4) of § 80.10(g) is deleted.

13. Paragraph (a) of § 80.12 is amended and a new concluding sentence is added to paragraph (c) to read:

§ 80.12 Effect on other regulations; forms and instructions.

(a) *Effect on other regulations.* All regulations, orders, or like directions heretofore issued by any officer of the Department which impose requirements designed to prohibit any discrimination against individuals on the ground of race, color, or national origin under any program to which this regulation applies, and which authorize the suspension or termination of or refusal to grant or to continue Federal financial assistance to any applicant for or recipient of assistance for failure to comply with such requirements, are hereby superseded to the extent that such discrimination is prohibited by this regulation, except that nothing in this regulation shall be deemed to relieve any person of any obligation assumed or imposed under any such superseded regulation, order, instruction, or like direction prior to the effective date of this regulation. Nothing in this regulation, however, shall be deemed to supersede any of the following (including future amendments thereof): (1) The "Standards for a Merit System of Personnel Administration," issued jointly by the Secretaries of Defense, of Health, Education, and Welfare, and of Labor, Part 70 of this chapter; (2) Executive Order 11063 and regulations issued thereunder, or any other regulations or instructions, insofar as such order, regulations, or instructions prohibit discrimination on the ground of race, color, or national origin in any program or situation to which this regulation is inapplicable, or prohibit discrimination on any other ground; or (3) requirements for Emergency School Assistance as published in 35 F.R. 13442 and codified as Part 181 of this title.

* * * * *

(c) *Supervision and coordination.* The responsible Department official may from time to time assign to officials of the Department, or to officials of other departments or agencies of the Government with the consent of such departments or agencies, responsibilities in connection with the effectuation of the purposes of title VI of the Act and this regulation (other than responsibility for review as provided in § 80.10(e)), including the achievement of effective coordination and maximum uniformity within the Department and within the executive branch of the Government in the application of title VI and this regulation to similar programs and in similar situations. Any action taken, determination made, or requirement imposed by an official of another Department or Agency acting pursuant to an assignment of responsibility under this section shall have the same effect as though such action had been taken by the responsible official of this Department.

§§ 80.1, 80.2, 80.3, 80.4, 80.5, 80.6, 80.7, 80.8, 80.9, 80.10, 80.11, 80.12 [Amended]

14. The following citations are added immediately after each of the listed sections of 45 CFR Part 80 as indicated below:

Section 80.1: (Sec. 601, Civil Rights Act of 1964; 78 Stat. 252; 42 U.S.C. 2000d.)

Section 80.2: (Secs. 602, 604 Civil Rights Act of 1964; 78 Stat. 252, 253; 42 U.S.C. 2000d-1, 2000d-3.)

Section 80.3: (Secs. 601, 602, 604 Civil Rights Act of 1964; 78 Stat. 252, 253; 42 U.S.C. 2000d, 2000d-1, 2000d-3.)

Section 80.4: (Secs. 601, 602 Civil Rights Act of 1964; 78 Stat. 252; 42 U.S.C. 2000d, 2000d-1, sec. 182, 80 Stat. 1209; 42 U.S.C. 2000d-5.)

Section 80.5: (Secs. 601, 602 Civil Rights Act of 1964; 78 Stat. 252; 42 U.S.C. 2000d, 2000d-1.)

Section 80.6: (Secs. 601, 602 Civil Rights Act of 1964; 78 Stat. 252; 42 U.S.C. 2000d, 2000d-1.)

Section 80.7: (Secs. 601, 602 Civil Rights Act of 1964; 78 Stat. 252; 42 U.S.C. 2000d, 2000d-1.)

Section 80.8: (Secs. 601, 602 Civil Rights Act of 1964; 78 Stat. 252; 42 U.S.C. 2000d, 2000d-1. Sec. 182, 80 Stat. 1209; 42 U.S.C. 2000d-5.)

Section 80.9: (Sec. 602, Civil Rights Act of 1964; 78 Stat. 252; 42 U.S.C. 2000d-1.)

Section 80.10: (Sec. 602, Civil Rights Act of 1964; 78 Stat. 252; 42 U.S.C. 2000d-1.)

Section 80.11: (Sec. 603, Civil Rights Act of 1964; 78 Stat. 253; 42 U.S.C. 2000d-2.)

Section 80.12: (Sec. 602, Civil Rights Act of 1964; 78 Stat. 252; 42 U.S.C. 2000d-1.)

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Section 80.13: (Sec. 602, Civil Rights Act of 1964; 78 Stat. 252; 42 U.S.C. 2000d–1.)

Dated: November 4, 1971.

ELLIOT L. RICHARDSON,
Secretary of Health,
Education and Welfare.

APPENDIX A

FEDERAL FINANCIAL ASSISTANCE TO WHICH THIS PART APPLIES

Part 1. Assistance other than for State-Administered Continuing Programs

1. Loans for acquisition of equipment for academic subjects, and for minor remodeling (20 U.S.C. 445).

2. Construction of facilities for institutions of higher education (20 U.S.C. 701–758).

3. School construction in federally affected and in major disaster areas (20 U.S.C. 631–647).

4. Construction of educational broadcast facilities (47 U.S.C. 390–399).

5. Loan service of captioned films and educational media; research on, and production and distribution of, educational media for the handicapped, and training of persons in the use of such media for the handicapped (20 U.S.C. 1452).

6. Demonstration residential vocational education schools (20 U.S.C. 1321).

7. Research and related activities in education of handicapped children (20 U.S.C. 1441).

8. Educational research, dissemination and demonstration projects; research training; and construction under the Cooperative Research Act (20 U.S.C. 331–332(b)).

9. Research in teaching modern foreign languages (20 U.S.C. 512).

10. Training projects for manpower development and training (42 U.S.C. 2601, 2602, 2610a–2610c).

11. Research and training projects in Vocational Education (20 U.S.C. 1281(a), 1283–1284).

12. Allowances to institutions training NDEA graduate fellows (20 U.S.C. 461–465).

13. Grants for training in librarianship (20 U.S.C. 1031–1033).

14. Grants for training personnel for the education of handicapped children (20 U.S.C. 1431).

15. Allowances to institutions training teachers and related educational personnel in elementary and secondary education, or postsecondary vocational education (20 U.S.C. 1111–1118).

16. Recruitment, enrollment, training and assignment of Teacher Corps personnel (20 U.S.C. 1101–1107a).

17. Operation and maintenance of schools in federally affected and in major disaster areas (20 U.S.C. 236–241; 241–1; 242–244).

18. Grants or contracts for the operation of training institutes for elementary or secondary school personnel to deal with special educational problems occasioned by desegregation (42 U.S.C. 2000c–3).

19. Grants for inservice training of teachers and other school personnel and employment of specialists in desegregation problems (42 U.S.C. 2000c–4).

20. Higher education student loan program (title II, National Defense Education Act, 20 U.S.C. 421–429).

21. Educational opportunity grants and assistance for State and private programs of low-interest insured loans and State loans to students in institutions of higher education (title IV, Higher Education Act of 1965, 20 U.S.C. 1061–1087).

22. Grants and contracts for the conduct of Talent Search, Upward Bound, and special services programs (20 U.S.C. 1068).

23. Land-grant college aid (7 U.S.C. 301–308; 321–326; 328–331).

24. Language and area centers (title VI, National Defense Education Act, 20 U.S.C. 511).

25. American Printing House for the Blind (20 U.S.C. 101–105).

26. Future Farmers of America (36 U.S.C. 271–391) and similar programs.

27. Science clubs (Public Law 85–875, 20 U.S.C. 2, note).

28. Howard University (20 U.S.C. 121–129).

29. Gallaudet College (31 District of Columbia Code, Ch. 10).

30. Establishment and operation of a model secondary school for the deaf by Gallaudet College (31 District of Columbia Code 1051–1053; 80 Stat. 1027–1028).

31. Faculty development programs, workshops and institutes (20 U.S.C. 1131–1132).

32. National Technical Institute for the Deaf (20 U.S.C. 681–685).

33. Institutes and other programs for training educational personnel (Parts D, E and F, title V, Higher Education Act of 1965) (20 U.S.C. 1119–1111c–4).

34. Grants and contracts for research and demonstration projects in librarianship (20 U.S.C. 1034).

35. Acquisition of college library resources (20 U.S.C. 1021–1028).

36. Grants for strengthening developing institutions of higher education (20 U.S.C. 1051–1054); National Fellowships for teaching at developing institutions (20 U.S.C. 1055), and grants to retired professors to teach at developing institutions (20 U.S.C. 1056).

37. College Work-Study Program (42 U.S.C. 2751–2757).

38. Financial assistance for acquisition of higher education equipment, and minor remodeling (20 U.S.C. 1121–1129).

39. Grants for special experimental demonstration projects and teacher training in adult education (20 U.S.C. 1208).

40. Grant programs for advanced and undergraduate international studies (20 U.S.C. 1171–1176; 22 U.S.C. 2452(b)).

41. Experimental projects for developing State leadership or establishment of special services (20 U.S.C. 865).

42. Grants to and arrangements with State educational and other agencies to meet special educational needs of migratory children of migratory agricultural workers (20 U.S.C. 241e(c)).

43. Grants by the Commissioner of Education to local educational agencies for supplementary educational centers and services; guidance, counseling, and testing (U.S.C. 841–844; 844b).

44. Resource centers for improvement of education of handicapped children (20 U.S.C. 1421) and centers and services for deaf-blind children (20 U.S.C. 1422).

45. Recruitment of personnel and dissemination of information on education of handicapped (20 U.S.C. 1433).

46. Grants for research and demonstrations relating to physical education or recreation for handicapped children (20 U.S.C. 1442) and training of physical educators and recreation personnel (20 U.S.C. 1443).

47. Dropout prevention projects (20 U.S.C. 887).

48. Bilingual education programs (20 U.S.C. 880b–880b–6).

49. Grants to agencies and organizations for Cuban refugees (22 U.S.C. 2601(b)(4)).

50. Grants and contracts for special programs for children with specific learning disabilities including research and related activities, training, and operating model centers (20 U.S.C. 1461).

51. Curriculum development in vocational and technical education (20 U.S.C. 1391).

52. Establishment including construction, and operation of a National Center on Educational Media and Materials for the Handicapped (20 U.S.C. 1453).

53. Grants and contracts for the development and operation of experimental preschool and early education programs for handicapped (20 U.S.C. 1423).

54. Grants to public or private nonprofit agencies to carry on the Follow Through Program in kindergarten and elementary schools (42 U.S.C. 2809(a)(2)).

55. Grants for programs of cooperative education and grants and contracts for training and research in cooperative education (20 U.S.C. 1087a–1087c).

56. Grants and contracts to encourage the sharing of college facilities and resources (network for knowledge) (20 U.S.C. 1133–1133b).

57. Grants, contracts, and fellowships to improve programs preparing persons for public service and to attract students to public service (20 U.S.C. 1134–1134b).

58. Grants for the improvement of graduate programs (20 U.S.C. 1135–1135c).

59. Contracts for expanding and improving law school clinical experience programs (20 U.S.C. 1136–1136b).

60. Exemplary programs and projects in vocational education (20 U.S.C. 1301–1305).

61. Grants to reduce borrowing cost for construction of residential schools and dormitories (20 U.S.C. 1323).

62. Project grants and contracts for research and demonstration relating to new or improved health facilities and services (sec. 304, Public Health Service Act, 42 U.S.C. 242b).

63. Grants for construction or modernization of emergency rooms of general hospitals (title VI, part C, Public Health Service Act, 42 U.S.C. 291r–291t).

64. Institutional and special project grants to schools of nursing (secs. 805–808, Public Health Service Act, 42 U.S.C. 296d–296g).

65. Grants for construction and initial staffing of facilities for prevention and treatment of alcoholism (sec. 241–2, Community Mental Health Centers Act (42 U.S.C. 2688f and g).

66. Grants for construction [illegible] staffing of specialized facilities [illegible] ment of alcoholics requiring [illegible] facilities (sec. 243, Community [illegible] Health Centers Act, 42 U.S.C. [illegible]

67. Special project grants for [illegible] grams, evaluation of existing [illegible] grams, and conduct of significant [illegible] relating to treatment of alcoholics [illegible] Community Mental Health Centers [illegible] U.S.C. 2688k).

68. Grants for construction [illegible] staffing of treatment facilities [illegible] addicts (sec. 251, Community Mental [illegible] Centers Act, 42 U.S.C. 2688m).

69. Special project grants for [illegible] grams, evaluation of existing [illegible] grams, and conduct of significant [illegible] relating to treatment of narcotic addicts [illegible] 252, Community Mental Health Centers [illegible] 42 U.S.C. 2688n).

70. Grants for consultation [illegible] Community Mental Health Centers [illegible] holism prevention and treatment [illegible] specialized facilities for alcoholics [illegible] facilities for narcotic addicts [illegible] for mental health of children [illegible] munity Mental Health Centers [illegible] 2688t).

71. Grants for construction [illegible] staffing of facilities for mental [illegible] children (sec. 271, Community [illegible] Centers Act, 42 U.S.C. 2688W).

72. Special project grants [illegible] grams and evaluation of existing [illegible] program relating to mental health [illegible] dren (sec. 272, Community [illegible] Centers Act, 42 U.S.C. 2688x).

73. Grants and loans for con[illegible] modernization of medical [illegible]

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DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
OFFICE OF THE SECRETARY
WASHINGTON, D.C. [illegible]

June 1972

MEMORANDUM TO PRESIDENTS OF INSTITUTIONS OF HIGHER EDUCATION
PARTICIPATING IN FEDERAL ASSISTANCE PROGRAMS

SUBJECT: The 1972 Compliance Report of Institutions of Higher Education Under Title VI of the Civil Rights Act of 1964

As you may recall, our Office mailed you, in January of this year, a sample copy of the 1972 Compliance Report of Institutions of Higher Education to provide ample time to establish data collection procedures. Copies of the actual form are attached to this memorandum. These are to be used to report student enrollment for the 1972 fall semester. Please do not use these report forms to indicate enrollment data for the current academic year. The filing date for the report is December 15, 1972; however, earlier returns would be appreciated.

Please note that a separate form is to be filed for each undergraduate, graduate and professional school at the main campus and each branch campus. In addition, we are requesting for the first time data on part-time students as well as full-time students.

As you know, Title VI of the Civil Rights Act of 1964 requires that recipients of Federal financial assistance offer their benefits and services without regard to race, color, or national origin. The purpose of this report is to determine the extent of participation by minority group persons in federally assisted programs. We hope that you will convey to all students and staff the importance of such information in the enforcement of the Nation's equal opportunity laws.

In addition to forwarding the compliance report forms, I am taking this opportunity to provide you with a summary of the requirements of Title VI for institutions of higher education. This information has been provided to your institutions previously and is sent to you at this time for your guidance. While the summary is not inclusive, I do hope that you will find it to be useful.

J. Stanley Pottinger

J. Stanley Pottinger
Director, Office for Civil Rights

SUMMARY OF REQUIREMENTS OF TITLE VI
OF THE CIVIL RIGHTS ACT OF 1964
FOR INSTITUTIONS OF HIGHER EDUCATION*

1. The recruitment practices of the institution must be conducted so that all groups of potential students will be reached without regard to race, color, or national origin. For example, if there are predominantly Negro and predominantly white high schools in the area served by a college, comparable recruiting efforts must be made at both types of schools.

2. Student admissions and enrollment policies must be free of discrimination on the grounds of race, color, or national origin. Insofar as potential enrollees are educationally disadvantaged, institutions are encouraged to consider whether the normal standards of admission accurately measure the ability of these students to successfully complete the proposed course of instruction.

3. All institution-owned and institution-supported housing intended for students must be available to all students. Assignments to such housing must be made without regard to race, color, or national origin. Institution-owned or supported housing is any housing administered by the institution or any housing where the institution donates, leases, rents or otherwise makes available its facilities or land for such housing or provides funds, surety guarantees or other financial assistance to acquire or operate facilities for housing purposes.

4. All auxiliary facilities which are supported by the institution must be available to students without regard to race, color, or national origin. Further, each college and university has a responsibility to assure that all institution or institution-supported services, facilities, activities and programs for students are available to students without regard to race, color, or national origin. Auxiliary facilities include cafeterias, student unions, offices and commercial concessions.

5. All institution-sponsored and supported activities and facilities must be made available to students' parents and visitors without regard to race, color, or national origin.

6. The awarding of scholarships and other financial aid administered by the institution must be free of discrimination on grounds of race, color, or national origin. Financial assistance includes both public and private scholarships, fellowships, student loans, traineeship stipends and employment obtained by the institution for the student as part of an assistance program; e.g., teaching assistantships, work-study programs. Student financial aid programs based on race or national origin may be consistent with Title VI if the purpose of such aid is to overcome the effects of past discrimination.

7. Where the institution donates, leases, or otherwise makes available institution-owned facilities or land for student use or activities which are a part of its overall program, or where the institution provides funds or other financial assistance to acquire or operate facilities or such activities, the institution must assure itself that the activities are operated without discrimination.

8. An institution which provides services to assist students to find off-campus housing or employment, including the maintenance of lists of off-campus housing and jobs, must make inquiry to assure itself that any housing, employment or other service available to its students is available without discrimination. A suggested method for obtaining such assurance, and one which has proven convenient for many colleges and universities to implement, is to have the homeowner, landlord or employer certify that housing or jobs are available on a nondiscriminatory basis. The institution must also provide a procedure for investigating any complaints of discrimination filed by students.

9. Students may not be referred to training facilities which discriminate in their policies or programs. This includes such programs as student teaching in local schools, clinical training, etc., and would generally apply to the medical, education and social work fields.

*This information is provided pursuant to Section 80.3(b) 45CFR Part 80

PART 100—NONDISCRIMINATION UNDER PROGRAMS RECEIVING FEDERAL ASSISTANCE THROUGH THE DEPARTMENT OF EDUCATION EFFECTUATION OF TITLE VI OF THE CIVIL RIGHTS ACT OF 1964

Sec.

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100.2 Application of this regulation.
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100.9 Hearings.
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100.13 Definitions.

APPENDIX A—FEDERAL FINANCIAL ASSISTANCE TO WHICH THESE REGULATIONS APPLY

APPENDIX B—GUIDELINES FOR ELIMINATING DISCRIMINATION AND DENIAL OF SERVICES ON THE BASIS OF RACE, COLOR, NATIONAL ORIGIN, SEX, AND HANDICAP IN VOCATIONAL EDUCATION PROGRAMS

AUTHORITY: Sec. 602, 78 Stat. 252; 42 U.S.C. 2000d-1, unless otherwise noted.

SOURCE: 45 FR 30918, May 9, 1980, unless otherwise noted.

§ 100.1 Purpose.

The purpose of this part is to effectuate the provisions of title VI of the Civil Rights Act of 1964 (hereafter referred to as the "Act") to the end that no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity receiving Federal financial assistance from the Department of Education.

(Authority: Sec. 601, Civil Rights Act of 1964; 78 Stat. 252; 42 U.S.C. 2000d)

§ 100.2 Application of this regulation.

This regulation applies to any program for which Federal financial assistance is authorized to be extended to a recipient under a law administered by the Department, including the Federal assisted programs and activities listed in Appendix A of this regulation. It applies to money paid, property transferred, or other Federal financial assistance extended after the effective date of the regulation pursuant to an application approved prior to such effective date. This regulation does not apply to (a) any Federal financial assistance by way of insurance or guaranty contracts, (b) money paid, property transferred, or other assistance extended before the effective date of this regulation, (c) the use of any assistance by any individual who is the ultimate beneficiary under any such program, or (d) any employment practice, under any such program, of any employer, employment agency, or labor organization, except to the extent described in § 100.3. The fact that a type of Federal assistance is not listed in Appendix A shall not mean, if Title VI of the Act is otherwise applicable, that a program is not covered. Federal financial assistance under statutes now in force or hereinafter enacted may be added to this list by notice published in the FEDERAL REGISTER.

(Authority: Secs. 602, 604, Civil Rights Act of 1964; 78 Stat. 252, 253; 42 U.S.C. 2000d-1, 2000d-3)

§ 100.3 Discrimination prohibited.

(a) *General.* No person in the United States shall, on the ground of race, color, or national origin be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program to which this part applies.

(b) *Specific discriminatory actions prohibited.* (1) A recipient under any program to which this part applies may not, directly or through contractual or other arrangements, on ground of race, color, or national origin:

(i) Deny an individual any service, financial aid, or other benefit provided under the program;

(ii) Provide any service, financial aid, or other benefit to an individual which is different, or is provided in a different manner, from that provided to others under the program;

(iii) Subject an individual to segregation or separate treatment in any matter related to his receipt of any

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service, financial aid, or other benefit under the program;

(iv) Restrict an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, financial aid, or other benefit under the program;

(v) Treat an individual differently from others in determining whether he satisfies any admission, enrollment, quota, eligibility, membership or other requirement or condition which individuals must meet in order to be provided any service, financial aid, or other benefit provided under the program;

(vi) Deny an individual an opportunity to participate in the program through the provision of services or otherwise or afford him an opportunity to do so which is different from that afforded others under the program (including the opportunity to participate in the program as an employee but only to the extent set forth in paragraph (c) of this section).

(vii) Deny a person the opportunity to participate as a member of a planning or advisory body which is an integral part of the program.

(2) A recipient, in determining the types of services, financial aid, or other benefits, or facilities which will be provided under any such program, or the class of individuals to whom, or the situations in which, such services, financial aid, other benefits, or facilities will be provided under any such program, or the class of individuals to be afforded an opportunity to participate in any such program, may not, directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin.

(3) In determining the site or location of a facilities, an applicant or recipient may not make selections with the effect of excluding individuals from, denying them the benefits of, or subjecting them to discrimination under any programs to which this regulation applies, on the ground of race, color, or national origin; or with the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the Act or this regulation.

(4) As used in this section, the services, financial aid, or other benefits provided under a program receiving Federal financial assistance shall be deemed to include any service, financial aid, or other benefits provided in or through a facility provided with the aid of Federal financial assistance.

(5) The enumeration of specific forms of prohibited discrimination in this paragraph and paragraph (c) of this section does not limit the generality of the prohibition in paragraph (a) of this section.

(6) (i) In administering a program regarding which the recipient has previously discriminated against persons on the ground of race, color, or national origin, the recipient must take affirmative action to overcome the effects of prior discrimination.

(ii) Even in the absence of such prior discrimination, a recipient in administering a program may take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color, or national origin.

(c) *Employment practices.* (1) Where a primary objective of the Federal financial assistance to a program to which this regulation applies is to provide employment, a recipient may not (directly or through contractual or other arrangements) subject an individual to discrimination on the ground of race, color, or national origin in its employment practices under such program (including recruitment or recruitment advertising, employment, layoff or termination, upgrading, demotion, or transfer, rates of pay or other forms of compensation, and use of facilities), including programs where a primary objective of the Federal financial assistance is (i) to reduce the employment of such individuals or to help them through employment to meet subsistence needs, (ii) to assist such individuals through employment to meet expenses incident to the commencement or continuation of their education or training, (iii) to provide

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federal register

WEDNESDAY, MARCH 21, 1979

THE NATIONAL ARCHIVES OF THE UNITED STATES • 1934 •

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

Office for Civil Rights

Office of the Secretary

■

VOCATIONAL EDUCATION PROGRAMS GUIDELINES FOR ELIMINATING DISCRIMINATION AND DENIAL OF SERVICES ON THE BASIS OF RACE, COLOR, NATIONAL ORIGIN, SEX AND HANDICAP

[4110-12-M]

Title 45—Public Welfare

SUBTITLE A—DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

VOCATIONAL EDUCATION PROGRAMS

Guidelines for Eliminating Discrimination and Denial of Services on the Basis of Race, Color, National Origin, Sex, and Handicap

AGENCY: Office for Civil Rights, Department of Health, Education, and Welfare.

ACTION: Final Guidelines for Vocational Education Programs.

SUMMARY: These guidelines explain the civil rights responsibilities of recipients of Federal funds offering or administering vocational education programs. They derive from and provide guidance supplementary to Title VI of the Civil Rights Act of 1964 and the implementing departmental regulation (45 CFR Part 80), Title IX of the Education Amendments of 1972 and the implementing departmental regulation (45 CFR Part 86), and Section 504 of the Rehabilitation Act of 1973 and the implementing departmental regulation (45 CFR Part 84).

EFFECTIVE DATE: March 15, 1979.

FOR FURTHER INFORMATION CONTACT:

David Gerard, Office of Standards, Policy, and Research, Department of Health, Education and Welfare, Office for Civil Rights, 330 Independence Avenue, S.W., Washington, D.C. 20201 (telephone 202-245-0177).

SUPPLEMENTARY INFORMATION: The following Guidelines explain how civil rights laws and Department regulations apply to vocational education programs. They are issued as a result of injunctive orders entered by the United States District Court for the District of Columbia in *Adams* v. *Califano*. They are also issued because the Department has found evidence of continuing unlawful discrimination in vocational education programs.

A. LEGAL BASIS FOR THE GUIDELINES

Title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, and national origin in any program or activity receiving Federal financial assistance. The Department of Health, Education, and Welfare issued regulations implementing Title VI in 1968. Title IX of the Education Amendments of 1972 prohibits discrimination on the basis of sex in education programs receiving or benefiting from Federal financial assistance. The Department issued regulations implementing Title IX in 1975. Section 504 of the Rehabilitation Act of 1973 prohibits discrimination on the basis of handicap in any program or activity receiving Federal financial assistance. The Department issued regulations implementing Section 504 in 1977. These civil rights statutes and their implementing regulations apply to vocational education programs.

In 1973, the Department of Health, Education, and Welfare was sued for its failure to enforce Title VI in a number of education areas, including vocational education (*Adams* v. *Califano*). As a result of this litigation, the Department was directed to enforce civil rights requirements in vocational education programs through compliance reviews, a survey of enrollments and related data, and the issuance of guidelines explaining the application of Title VI regulations to vocational education. The Guidelines that follow are issued to meet a requirement of the *Adams* court orders.

B. FACTUAL BASIS FOR THE GUIDELINES

The Guidelines are also adopted because it is apparent that many vocational education administrators engage in unlawfully discriminatory practices. They need additional guidance and support from the Department to meet their obligations under civil rights authorities.

Information provided by the Office of Education's Bureau of Occupational and Adult Education for 1976 and 1977 reveals that male and female students are concentrated in programs traditionally identified as intended for them:

	Percent of total enrollment			
	1976		1977	
	Male	Female	Male	Female
Health occupations	21.3	78.6	[illegible]	[illegible]
Occupational home economics	15.3	84.7	[illegible]	[illegible]
Consumer and homemaking	18.8	[illegible]	[illegible]	[illegible]
Office occupations	24.0	[illegible]	[illegible]	[illegible]
Technical	88.7	[illegible]	[illegible]	[illegible]

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guage and must state that recipients will take steps to assure that the lack of English language skills will not be a barrier to admission and participation in vocational education programs.

V. COUNSELING AND PREVOCATIONAL PROGRAMS

A. RECIPIENT RESPONSIBILITIES

Recipients must insure that their counseling materials and activities (including student program selection and career/employment selection), promotional, and recruitment efforts do not discriminate on the basis of race, color, national origin, sex, or handicap.

B. COUNSELING AND PROSPECTS FOR SUCCESS

Recipients that operate vocational education programs must insure that counselors do not direct or urge any student to enroll in a particular career or program, or measure or predict a student's prospects for success in in any career or program based upon the student's race, color, national origin, sex, or handicap. Recipients may not counsel handicapped students toward more restrictive career objectives than nonhandicapped students with similar abilities and interests. If a vocational program disproportionately enrolls male or female students, minority or nonminority students, or handicapped students, recipients must take steps to insure that the disproportion does not result from unlawful discrimination in counseling activities.

C. STUDENT RECRUITMENT ACTIVITIES

Recipients must conduct their student recruitment activities so as not to exclude or limit opportunities on the basis of race, color, national origin, sex, or handicap. Where recruitment activities involve the presentation or portrayal of vocational and career opportunities, the curricula and programs described should cover a broad range of occupational opportunities and not be limited on the basis of the race, color, national origin, sex, or handicap of the students or potential students to whom the presentation is made. Also, to the extent possible, recruiting teams should include persons of different races, national origins, sexes, and handicaps.

D. COUNSELING OF STUDENTS WITH LIMITED ENGLISH-SPEAKING ABILITY OR HEARING IMPAIRMENTS

Recipients must insure that counselors can effectively communicate with national origin minority students with limited English language skills and with students who have hearing impairments. This requirement may be satisfied by having interpreters available.

E. PROMOTIONAL ACTIVITIES

Recipients may not undertake promotional efforts (including activities of school officials, counselors, and vocational staff) in a manner that creates or perpetuates stereotypes or limitations based on race, color, national origin, sex or handicap. Examples of promotional efforts are career days, parents' night, shop demonstrations, visitations by groups of prospective students and by representatives from business and industry. Materials that are part of promotional efforts may not create or perpetuate stereotypes through text or illustration. To the extent possible they should portray males or females, minorities or handicapped persons in programs and occupations in which these groups traditionally have not been represented. If a recipient's service area contains a community of national origin minority persons with limited English language skills, promotional literature must be distributed to that community in its language.

VI. EQUAL OPPORTUNITY IN THE VOCATIONAL EDUCATION INSTRUCTIONAL SETTING

A. ACCOMMODATIONS FOR HANDICAPPED STUDENTS

Recipients must place secondary level handicapped students in the regular educational environment of any vocational education program to the maximum extent appropriate to the needs of the student unless it can be demonstrated that the education of the handicapped person in the regular environment with the use of supplementary aids and services cannot be achieved satisfactorily. Handicapped students may be placed in a program only after the recipient satisfies the provisions of the Department's Regulation, 45 CFR Part 84, relating to evaluation, placement, and procedural safeguards. If a separate class or facility is identifiable as being for handicapped persons, the facility, the programs, and the services must be comparable to the facilities, programs, and services offered to nonhandicapped students.

B. STUDENT FINANCIAL ASSISTANCE

Recipients may not award financial assistance in the form of loans, grants, scholarships, special funds, subsidies, compensation for work, or prizes to vocational education students on the basis of race, color, national origin, sex, or handicap, except to overcome the effects of past discrimination. Recipients may administer sex restricted financial assistance where the assistance and restriction are established by will, trust, bequest, or any similar legal instrument, if the overall effect of all financial assistance awarded does not discriminate on the basis of sex. Materials and information used to notify students of opportunities for financial assistance may not contain language or examples that would lead applicants to believe the assistance is provided on a discriminatory basis. If a recipient's service area contains a community of national origin minority persons with limited English language skills, such information must be disseminated to that community in its language.

C. HOUSING IN RESIDENTIAL POSTSECONDARY VOCATIONAL EDUCATION CENTERS

Recipients must extend housing opportunities without discrimination based on race, color, national origin, sex, or handicap. This obligation extends to recipients that provide on-campus housing and/or that have agreements with providers of off-campus housing. In particular, a recipient postsecondary vocational education program that provides on-campus or off-campus housing to its nonhandicapped students must provide, at the same cost and under the same conditions, comparable convenient and accessible housing to handicapped students.

D. COMPARABLE FACILITIES

Recipients must provide changing rooms, showers, and other facilities for students of one sex that are comparable to those provided to students of the other sex. This may be accomplished by alternating use of the same facilities or by providing separate, comparable facilities.

Such facilities must be adapted or modified to the extent necessary to make the vocational education program readily accessible to handicapped persons.

VII. WORK STUDY, COOPERATIVE VOCATIONAL EDUCATION, JOB PLACEMENT, AND APPRENTICE TRAINING

A. RESPONSIBILITIES IN COOPERATIVE VOCATIONAL EDUCATION PROGRAMS, WORK STUDY PROGRAMS, AND JOB PLACEMENT PROGRAMS

A recipient must insure that: (a) it does not discriminate against its students on the basis of race, color, national origin, sex, or handicap in making available opportunities in cooperative education, work study and job placement programs; and (b) students participating in cooperative education, work study and job placement programs are not discriminated against by employers or prospective employers on the basis of race, color, national origin, sex, or handicap in recruitment, hiring, placement, assignment to work tasks, hours of employment, levels of responsibility, and in pay.

If a recipient enters into a written agreement for the referral or assignment of students to an employer, the agreement must contain an assurance from the employer that students will be accepted and assigned to jobs and otherwise treated without regard to race, color, national origin, sex, or handicap.

Recipients may not honor any employer's request for students who are free of handicaps or for students of a particular race, color, national origin, or sex. In the event an employer or prospective employer is or has been subject to court action involving discrimination in employment, school officials should rely on the court's findings if the decision resolves the issue of whether the employer has engaged in unlawful discrimination.

B. APPRENTICE TRAINING PROGRAMS

A recipient may not enter into any agreement for the provision or support of apprentice training for students or union members with any labor union or other sponsor that discriminates against its members or applicants for membership on the basis of race, color, national origin, sex, or handicap. If a recipient enters into a written agreement with a labor union or other sponsor providing for apprentice training, the agreement must contain an assurance from the union or other sponsor: (1) that it does not engage in such discrimination against its membership or applicants for membership; and (2) that apprentice training will be offered and conducted for its membership free of such discrimination.

VIII. EMPLOYMENT OF FACULTY AND STAFF

A. EMPLOYMENT GENERALLY

Recipients may not engage in any employment practice that discriminates against any employee or applicant for employment on the basis of sex or handicap. Recipients may not engage in any employment practice that discriminates on the basis of race, color, or national origin if such discrimination tends to result in segregation, exclusion or other discrimination against students.

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DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

Office of the Secretary

45 CFR Part 80

Nondiscrimination in Federally Assisted Programs; Title VI of the Civil Rights Act of 1964; Policy Interpretation

AGENCY: Office for Civil Rights, Department of Health, Education, and Welfare.

ACTION: Policy interpretation.

SUMMARY: The Office for Civil Rights issues a policy interpretation of regulations under Title VI of the Civil Rights Act of 1964. The regulations concern nondiscrimination in federally assisted programs. This policy interpretation is issued in connection with the Office for Civil Rights' ongoing responsibilities to interpret and enforce Title VI. It is also prompted by the Supreme Court's decision in *Regents of the University of California v. Bakke*. It is one of a series of policy determinations issued by the Office for Civil Rights under the procedures announced in the Federal Register on May 1, 1978 (43 FR 18630).

FOR FURTHER INFORMATION CONTACT: Burton M. Taylor, (202) 472-3216.

Title VI of the Civil Rights Act of 1964 Policy Interpretation Number 1

SUBJECT: Voluntary Affirmative Action: Admission of Minority Students to Institutions of Higher Education.

PURPOSE: This policy interpretation encourages institutions of higher education to continue and expand voluntary affirmative action programs to increase their enrollment of minority group members and to attain a diverse student body. It identifies permissible techniques to achieve these objectives consistent with Title VI of the Civil Rights Act of 1964 and the Supreme Court's decision in *Regents of the University of California v. Bakke*, 438 U.S. 265(1978) (*Bakke*).

SUMMARY OF POLICY INTERPRETATION: An institution of higher education that receives Federal financial assistance is encouraged to take voluntary affirmative action in admissions to overcome the effects of conditions that have resulted in limited participation by minority group members and to attain a diverse student body. The Department has reviewed the Supreme Court's decision in *Bakke* and has determined that voluntary affirmative action may include, but is not limited to, the following: consideration of race, color, or national origin among the factors evaluated in selecting students; increased recruitment in minority institutions and communities; use of alternative admissions criteria when traditional criteria are found to be inadequately predictive of minority student success; provision of preadmission compensatory and tutorial programs; and the establishment and pursuit of numerical goals to achieve the racial and ethnic composition of the student body the institution seeks.

Techniques of this kind are permissible regardless of whether there has been a finding of past discrimination. Where such a finding has been made, an institution has a duty to overcome the effects of past discrimination and, therefore, may be required to employ these as well as other race conscious techniques to overcome the present effects of past discrimination. These additional techniques also may be employed by colleges and universities to overcome the effects of discrimination found to have been committed by related institutions. However, in light of *Bakke*, in the absence of a finding of past discrimination committed by the institution or related entities, a fixed number of positions may not be set aside for minority students for which nonminority students cannot compete, nor may race or national origin otherwise be used as the sole criterion for admissions.

POLICY INTERPRETATION: Title VI of the Civil Rights Act of 1964 prohibits institutions of higher education that receive or benefit from Federal financial assistance from discriminating against applicants for admission on the basis of race, color, or national origin. The primary purpose of the statute was to eliminate widespread discrimination against blacks and other minorities in Federally-assisted programs. Accordingly, the Department's Title VI regulation requires recipients of Federal financial assistance, when found to be discriminating, to end any current discrimination and to take affirmative action to overcome the effects of past discrimination.

Findings of discrimination can be made by a legislative, judicial or administrative body, including the Office for Civil Rights. The regulation also permits a recipient to take affirmative action to overcome the effects of conditions that have resulted in limited participation by persons of a particular race, color, or national origin and to attain a diverse student body. This is permitted even though the recipient has not itself discriminated against these groups.

The Department has reviewed its Title VI regulation, in light of the Supreme Court's decision in *Bakke*, and has concluded that no changes in the regulation are required or desirable. The Court affirmed the legality of voluntary affirmative action. However, where there has been no finding of past discrimination, *Bakke* prohibits an institution from setting aside a fixed number of places for minority students for which nonminorities cannot compete, or otherwise using race as the sole criterion for admission.

The limitations contained in *Bakke* apply only to institutions undertaking voluntary affirmative action. The decision has no bearing on the legal obligation of an institution which has been found, by a court, legislature or administrative agency, to have discriminated on the basis of race, color, or national origin. Race conscious procedures that are impermissible in voluntary affirmative action programs may be required to correct specific acts of past discrimination committed by an institution or other entity to which the institution is directly related. For example newly established public institutions of higher education in a State that formerly maintained segregated colleges may be required to participate in a desegregation plan to provide a complete remedy for past discrimination.

The Department encourages the continuation and expansion of voluntar affirmative action programs. This policy interpretation provides guidance to institutions of higher education that are not responding to a finding of past discrimination as to permissible means of increasing minority student enrollments under the Department's Title VI regulation. One illustration of permissible voluntary action is stated in the regulation:

> Even though an applicant or recipient has never used discriminatory policies, the services and benefits of the program or activity it administers may not in fact be equally available to some racial or nationality groups. In such circumstances, a applicant or recipient may properly give special consideration to race, color, or national origin to make the benefits of its program more widely available to such groups, not being adequately served. For example, where a university is not adequately serving members of a particular racial or nationality group, it may establis special recruitment policies to make its program better known and more readily available to such group, and take other step to provide that group with more adequate service.

Other methods of considering race, color, or national origin in voluntary affirmative action programs, consistent with *Bakke* and the Department's regulation, include but are not limited t the following:

An institution may:

(1) Consider race, color or national origin as a positive factor with other factors, such as geographic or economi circumstance, in selecting from among qualified candidates. The relative weight granted to each factor is proper determined by institution officials; rac color or national origin may be accord greater weight than other factors.

(2) Recruit, or increase recruiting, in predominantly minority institutions ar communities;

(3) Modify admissions criteria for minorities if it determines that it is necessary for a fair appraisal of the academic promise of minority applicants. This may be appropriate t cure established inaccuracies in predicting performance where an institution can demonstrate that traditional admissions criteria are not predictive of success for minority students;

(4) Offer special services, including summer institutes and special tutoring

services, to assist educationally and socially disadvantaged students in meeting admissions requirements. Students may not be excluded from these programs on the basis of race, but race may be considered as a factor in selecting participants; and

(5) Establish and pursue numerical goals to achieve the racial and ethnic composition of the student body it seeks through techniques such as those listed above.

In addition to the foregoing techniques, institutions may use their authority to broaden admissions criteria generally to evaluate better the qualifications of minority applicants. This may be accomplished by giving increased consideration to an applicant's character, motivation, ability to overcome economic and educational disadvantage, work experience, and other factors.

All of these techniques are consistent with Title VI because they do not exclude individuals on the basis of race, color, or national origin from competing for any place in an institution of higher education. The Department encourages the development of additional or alternative techniques for inclusion in voluntary affirmative action plans.

§ 80.3 [Amended].

(b)(6) * * *

(i) In administering a program regarding which the recipient has previously discriminated against persons on the ground of race, color, or national origin, the recipient must take affirmative action to overcome the effects of prior discrimination.

(ii) Even in the absence of such prior discrimination, a recipient in administering a program may take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color, or national origin.

Section 80.5(j).

Even though an applicant or recipient has never used discriminatory policies, the services and benefits of the program or activity it administers may not, in fact, be equally available to some racial or nationality groups. In such circumstances, an applicant or recipient may properly give special consideration to race, color or national origin to make the benefits of its program more widely available to such groups, not then being adequately served. For example, where a university is not adequately serving members of a particular racial or nationality group, it may establish special recruitment policies to make its programs better known and more readily available to such group, and take other steps to provide that group with more adequate service.

Coverage: This policy interpretation applies to any public or private institution of higher education that receives or benefits from financial assistance authorized or extended under a law administered by the Department. Coverage includes institutions whose students participate in HEW funded or guaranteed student loan assistance programs. For further information, see definition of recipient at 45 CFR 80.13(i) and (j).

Regulation issued under Title VI of the Civil Rights Act of 1964. 45 CFR.

Dated: October 2, 1979.

David S. Tatel,

Director, Office for Civil Rights.

[FR Doc. 79-[illegible] Filed 10-9-79; 8:45 am]

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UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF THE ASSISTANT SECRETARY FOR CIVIL RIGHTS

MAR 24 1982

RE: __________ v. Massachusetts Institute of Technology #01802046

Dear

This is in response to your recent appeal of the no-cause determination made by the Boston Regional Office for Civil Rights (OCR) regarding your allegation that the Massachusetts Institute of Technology (M.I.T.) discriminated against you on the basis of national origin by denying you the opportunity to compete for a Minority Tuition Fellowship. I understand that M.I.T. agreed to the facts you presented; the disagreement is thus entirely as to the legal implications of those facts. In accordance with normal OCR procedures, Headquarters' staff reviewed the original decision of the Boston Regional Office in your case because of the nature of the issues involved. We have carefully reexamined the legal basis for the decision and determined that your case was decided properly. This letter describes the bases for our determination.

In your letter you put forward several arguments: (1) that the Regional Office's decision "goes against the spirit" of the Supreme Court's decision in Regents of the University of California v. Bakke, 438 U.S. 265 (1978), although you concede that the decision related to university admissions, not financial aid policies; (2) that the district court opinion in Flanagan v. President and Directors of Georgetown College, 417 F. Supp. 377 (D.D.C. 1976) supports your position "that ethnic background does play a role in financial aid decisions only when a similar aid package is offered to nonminority individuals;" (3) that the allowance for "special treatment of minorities over other minorities" under Title VI of the Civil Rights Act arises only from the particular context of Cuban refugees in Florida; (4) that minorities at M.I.T. should not be treated differently from one another because there was no history of past discrimination in the administration of graduate financial aid at M.I.T.; and (5) that no reason therefore exists to "go against the principle of the law . . . that individuals should not be discriminated because of their ethnic background" [emphasis yours]. Our review of these issues is discussed below.

We do not consider it proper to extend the Bakke decision from admissions policies to all race-conscious actions by universities. Admissions quotas, the policy at issue in Bakke, unlike many other policies, may result in the exclusion of an individual from a university on the basis of race or national origin. The availability of a particular financial aid program does not have such a far-reaching effect.

You are correct that the *Flanagan* case, which resulted in the disapproval of a setaside of financial aid funds for minority students at Georgetown University, bears some similarity to yours. That decision was handed down in 1976, prior to several Supreme Court decisions that addressed the scope of permissible voluntary affirmative action programs, and it was based on a rationale not applied by the Supreme Court in those cases. See *United Steelworkers v. Weber*, 443 U.S. 193 (1979) and *Fullilove v. Klutznick*, 448 U.S. 448 (1980). The *Flanagan* decision is binding only in the District of Columbia. The Federal Government was not a party to that case, so is not bound by it outside of the District of Columbia. M.I.T. is in the First Federal Judicial Circuit, which has not ruled on the issues in your case. As a result, OCR must be guided by Supreme Court decisions and our own Regulation in this matter.

The example in the Title VI Regulation you mention in relation to Cuban refugees in Florida is not the only type of race-conscious conduct permitted under Title VI and is not applicable to your situation. The Regulation explains that remedying the effects of past discrimination may require more than the application of a race-neutral policy and, as explained below, that voluntary affirmative action in the absence of past discrimination by the recipient may include race-conscious behavior.

Neither case law nor the Title VI Regulation limits an institution to race-conscious affirmative measures solely to remedy the effects of its own discrimination. The *Bakke* decision allows for such measures but does not provide much guidance beyond prohibiting the use of racial quotas to admit students where the institution is not remedying its own past discrimination. It is relevant to your case that, in enacting the Graduate and Professional Opportunities Program (G-POP), Title IX of the Higher Education Act, 20 U.S.C. §1134e(d)(3), the Congress has made a finding that minorities are underrepresented in graduate and professional programs. M.I.T.'s determination that members of certain minority groups are underrepresented in graduate and professional programs is consonant with that finding and with the purpose on which the G-POP program is based.

The Civil Rights Act of 1964 prohibits discrimination on the basis of race, color or national origin. However, as this discussion indicates, race-conscious behavior may be required in some instances and may be permissible in others. The Supreme Court did not adopt the minority position in *Bakke* that the Civil Rights Act requires institutions to be "color-blind." However, it is clear that race-conscious programs must be temporary; they may be conducted only until the effects of past discrimination have been eliminated.

I hope that this letter sufficiently explains the basis for our decision. I regret that we are unable to be of further assistance to you.

Sincerely,

Burton M Taylor

Burton M. Taylor, Director
Division of Postsecondary Education
Office for Civil Rights

cc: Director, Office for Civil Rights, Region I

E-5

MEMORANDUM

UNITED STATES DEPARTMENT OF EDUCATION
WASHINGTON, D.C. 20202

TO : Gilbert D. Roman
Regional Director
Region VIII

DATE MAR 22 1983

Joan Standlee
FROM : Joan Standlee
Deputy Assistant Secretary
for Civil Rights

SUBJECT: Policy Clarification re Title VI and Minority Fellowship Programs at the University of Denver (#08-83-6001)

This is in response to your February 9 memorandum to the Assistant Secretary in which you asked whether three of the financial assistance fellowship programs administered by the University of Denver Graduate School of Business and Public Management result in violations of Title VI in light of Regents of the University of California v. Bakke, 438 U.S. 265 (1978). The three fellowship programs in question are the Graduate and Professional Opportunities Program (GPOP), which was established by Congress and is funded by the Education Department, a fellowship program financed by the New York Life Insurance Company, and a fellowship program financed by IBM. These fellowship programs are three of ten sources of financial assistance administered by this school. According to your memorandum, the two privately financed fellowships, as administered by the school, are restricted to minority students in accordance with the terms of the two private companies. Also, according to your memorandum, the GPOP fellowships are all awarded to minority students. You also provided information indicating that the school has enrolled small numbers of minority students, and that minorities are underrepresented at this school as well as at schools of business in general.

In connection with your request for policy clarification you raised several specific issues. I will address your questions in the order in which you stated them.

We do not believe that Bakke is controlling as to the award of student financial aid, as the decision addresses issues relating only to admissions. It is important to note the distinction between financial aid and admissions. It is our understanding that students are admitted to the University of Denver Graduate School of Business and Public Management according to ordinary criteria. The issue in this case is not one of exclusion from the school on the basis of race or national origin.

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The administration of the two privately financed fellowships you described does not limit nonminority students from applying and qualifying for the major proportion of financial assistance administered by the school. These minority fellowships are voluntary affirmative efforts that are intended to increase minority representation in specified fields and financed by private grants of limited duration. Accordingly, we conclude that administering these fellowships does not place the University in violation of Title VI. This is consistent with the action taken in the Region I case cited in your memorandum.

The Graduate and Professional Opportunities Program is consistent with Title VI and with Bakke. Subsequent to Bakke, the Office of General Counsel of the Department of Health, Education and Welfare (DHEW) issued a memorandum describing the impact of Bakke on DHEW programs and policies. A copy of this memorandum, dated April 1979, is attached for your information. The memorandum concludes that GPOP and the voluntary affirmative action provision of the Title VI regulation [now codified at 34 C.F.R. §100.3(b)(6)(ii)] are consistent with the holding in Bakke.

I trust that this guidance is sufficient for you to complete the University of Denver compliance review. The substantial effort and careful thought apparent in your memorandum are commendable.

Attachment

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UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF THE ASSISTANT SECRETARY FOR CIVIL RIGHTS

MAY 2 1986

Dear

This is in response to your letters to me dated December 12, 1985, and January 14, 1986, and your letter to John E. Palomino, Acting Regional Director, Office for Civil Rights (OCR), Region IX, dated November 18, 1985. These letters posed several questions concerning the scholarships provided by your Dutch-American organization and concerning the Federal regulation that prohibits discrimination on the basis of race, color, or national origin in the provision of student financial aid. You also requested an explanation of my referral of your letter of October 14, 1985, to OCR's San Francisco Regional Office because you believe that the problem is national, rather than regional, in nature.

For your information, a copy of the regulation implementing Title VI of the Civil Rights Act of 1964 is enclosed. With regard to your question about the Dutch-American scholarship, this office cannot make an official determination of the legal status of the scholarship outside the context of a specific complaint. OCR does not issue advisory opinions.

The regulation implementing Title VI at 34 C.F.R. § 100.3 states, in part:

> (b) Specific discriminatory actions prohibited. (1) A recipient under any program to which this part applies may not, directly or through contractual or other arrangements, on ground, of race, color, or national origin:
>
> > (i) Deny an individual any service, financial aid, or other benefit provided under the program;
> >
> > (ii) Provide any service, financial aid, or other benefit to an individual which is different, or is provided in a different manner, from that provided to others under the program[.]

This same regulation goes further to state:

> > (6)(i) In administering a program regarding which the recipient has previously discriminated against persons on the ground of race, color, or national origin, the recipient must take affirmative action to overcome the effects of prior discrimination.

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> (ii) Even in the absence of such prior discrimination, a recipient in administering a program may take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color, or national origin.

The regulation quoted above was adopted prior to the U.S. Supreme Court ruling in Regents of the University of California v. Bakke, 438 U.S. 265 (1978), a case challenging a special admissions program for members of certain minority groups to the Medical School of the University of California at Davis. The Supreme Court held that the minority admission quota at the Medical School was unlawful. Justice Powell, in his "touchstone" opinion, stated:

> In summary, it is evident that the Davis special admission program involves the use of an explicit racial classification never before countenanced by this Court. It tells applicants who are not Negro, Asian, or Chicano that they are totally excluded from a specific percentage of the seats in an entering class. No matter how strong their qualifications, quantitative and extracurricular, including their own potential for contribution to educational diversity, they are never afforded the chance to compete with applicants from the preferred groups for the special admissions seats. At the same time, the preferred applicants have the opportunity to compete for every seat in the class.
>
> The fatal flaw in petitioner's preferential program is its disregard of individual rights as guaranteed by the Fourteenth Amendment. Shelley v. Kraemer, 334 U.S. [1], at 22 (1948). Such rights are not absolute. But when a State's distribution of benefits or imposition of burdens hinges on ancestry or the color of a person's skin, that individual is entitled to a demonstration that the challenged classification is necessary to promote a substantial state interest. Petitioner has failed to carry this burden. For this reason, that portion of the California court's judgment holding petitioner's special admissions program invalid under the Fourteenth Amendment must be affirmed. 438 U.S. at 319-320.

Any determination with respect to the legality of the scholarship program mentioned in your letter would take into consideration the Title VI law, regulation, the Bakke case, and other relevant case law. However, I am not aware of any determination that Dutch Americans have been discriminated against or limited in their participation in federally financed programs.

With regard to OCR's handling of the issues that you raised, letters that seem to contain complaints against educational institutions are routinely sent to regional offices for appropriate action. The regional office determines whether the letter is a complaint, which it then investigates, or whether some other action, such as technical assistance, is indicated. Your letter was referred to the San Francisco Regional Office because you stated that "a state university in California did not allow a student to accept the award" from your organization.

I am advised that the San Francisco Regional Office contacted you, and you informed that office that the most recent incident of which you were aware occurred in the State of Washington. You were referred to OCR's Seattle Regional Office for appropriate action, as that regional office is responsible for investigating complaints against universities in the State of Washington. Following discussions between headquarters staff and regional staff, it was agreed that your letters do not constitute a complaint that can be investigated by OCR since you neither name a specific institution nor specify what particular act of discrimination is being alleged.

Before applying the regulation, OCR's regional office must obtain facts about the circumstances at a particular institution. A threshold determination in the application of Title VI is whether the program or activity in which the discrimination is alleged receives Federal financial assistance. (The issue is not whether discrimination is alleged at a state institution, as your letter implies.) Such a determination requires that the region obtain information on the Federal financial assistance received by the educational institution. Receipt by the university of student financial aid funds from the Department of Education provides jurisdiction for OCR to investigate allegations of discrimination in the university's entire financial aid program. If a university receives Federal student financial aid funds, the region also must determine the extent to which the university, in contrast to your organization (which I assume is not a recipient of Federal aid), participates in the administration of the scholarship program.

I am unable to respond to your concern about jeopardizing the tax-exempt status of your organization. Since OCR has no authority with respect to the tax status of an organization, I have referred your correspondence to the Internal Revenue Service (IRS). IRS should be able to determine whether there is some way to further the purposes of your organization without involving a recipient of Federal financial assistance and without jeopardizing your organization's tax status. IRS will respond to you directly.

Sincerely,

Alicia Coro

Alicia Coro
Acting Assistant Secretary
for Civil Rights

Enclosures

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UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS
REGION VII
Executive Hills North
10220 North Executive Hills Boulevard, 8th Floor
Kansas City, Missouri 64153

DEC - 3 1986

OFFICE OF THE REGIONAL DIREC

Scholarship Coordinator
Southwest Missouri State University
901 South National Avenue
Springfield, Missouri 65804-0095

Dear Mr. [redacted]

This is in response to your recent request for technical assistance regarding a proposed minority leadership scholarship at Southwest Missouri State University (SMSU). Specifically, in an October 16, 1986, telephone conversation with John Nigro, of my staff, and in a subsequent letter dated November 5, 1986, you requested an Office for Civil Rights (OCR) review of the proposed scholarship program in order to determine whether it is in compliance with the regulation implementing Title VI of the Civil Rights Act of 1964 (Title VI).

With regard to student financial assistance on the basis of race, color, or national origin, the regulation implementing Title VI requires that all programs and activities be provided in a nondiscriminatory manner. The regulation implementing Title VI at 34 C.F.R. § 100.3(b)(1)(i) through (v) requires that:

> § 100.3 Discrimination prohibited.
>
> (b) Specific discriminatory actions prohibited. (1) A recipient under any program to which this part applies may not, directly or through contractual or other arrangements, on ground of race, color, or national origin:
>
> (i) Deny an individual any service, financial aid, or other benefit provided under the program;
>
> (ii) Provide any service, financial aid, or other benefit to an individual which is different, or is provided in a different manner, from that provided to others under the program;

> (iii) Subject an individual to segregation or separate treatment in any manner related to his receipt of any service, financial aid, or other benefit under the program;
>
> (iv) Restrict an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, financial aid, or other benefit under the program;
>
> (v) Treat an individual differently from others in determining whether he satisfies any admission, enrollment, quota, eligibility, membership or other requirement or condition which individuals must meet in order to be provided any service, financial aid, or other benefit provided under the program; . . .

During your telephone conversation with Mr. Nigro, you explained that the scholarship program was targeted towards those individuals who have contributed to the minority community. You explained that the applicants do not have to be a member of a particular minority group; however, preference will be given to minority applicants. Prospective applicants will all be evaluated on their respective contributions to the minority community.

In addition to the above-referenced Title VI regulatory provisions, the "Guidelines for Eliminating Discrimination and Denial of Services on the Basis of Race, Color, National Origin, Sex and Handicap in Vocational Education Programs," found at Appendix B of the enclosed Title VI implementing regulation, discusses a recipient's responsibility in administering scholarships. Under the topic of "Student Financial Assistance," found on page 30930, a recipient may not award financial assistance in the form of loans, grants, scholarships, special funds, subsidies compensation for work, or prizes to vocational education students on the basis of race, color, national origin, sex, or handicap, except to overcome the effects of past discrimination. Recipients may administer sex restricted financial assistance where the assistance and restriction are established by will, trust, bequest, or any similar legal instrument, if the overall effect of all financial assistance awarded does not discriminate on the basis of sex

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Similar to the Guidelines, the Title VI regulation at 34 C.F.R. § 100.3(b)(6) states:

> (6)(i) In administering a program regarding which the recipient has previously discriminated against persons on the ground of race, color, or national origin, the recipient must take affirmative action to overcome the effects of prior discrimination.
>
> (ii) Even in the absence of such prior discrimination, a recipient in administering a program may take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color, or national origin.

Review of OCR files disclosed no evidence that SMSU had been previously found in violation of Title VI, thus requiring affirmative action to overcome the effects of prior discrimination. Similarly, you presented no information indicating that conditions of SMSU programs resulted in limited participation by persons of a particular race, color, or national origin in those programs. As stated at 34 C.F.R. § 100.3(b)(6)(ii), voluntary affirmative action is permitted when taken to overcome the effects of such conditions. In the absence of information establishing that previous conditions at SMSU limited minority individuals' participation in SMSU programs, OCR cannot determine whether your proposed minority leadership scholarship meets the requirements of 34 C.F.R. § 100.3(b)(6)(ii).

In addition to the above, OCR's review of the scholarship application disclosed that the notification of nondiscrimination located at the bottom of the second page does not comply with the requirements of the regulations implementing Title IX of the Education Amendments of 1972 (Title IX) and Section 504 of the Rehabilitation Act of 1973 (Section 504). The regulations implementing Title IX at 34 C.F.R. § 106.9(b)(1) and Section 504 at 34 C.F.R. § 104.8(b) both require a recipient of Federal financial assistance to make appropriate notification of nondiscrimination on the basis of sex and handicap, respectively, in each announcement, bulletin, catalog, or application form made available to interested persons. The notification must state that the recipient does not discriminate on the bases of sex and handicap in programs or activities operated by the recipient. The notification of nondiscrimination must also identify the individual(s) who has (have) been designated to coordinate the recipient's compliance efforts with the implementing regulations. You may wish to use the following statement:

Page 4 -

> SMSU does not discriminate on the bases of race, color, national origin, sex, age or handicap in admission or access to, or treatment or employment in, its programs and activities. If you have any questions regarding SMSU's compliance with Title VI, Title IX or Section 504, please contact the Affirmative Action Office, 209 Carrington Hall, at (417) 836-5274.

Copies of the regulations implementing Title VI, Title IX, and Section 504 are enclosed for your review. If you have any questions, please contact Michael B. Hamilton, Director, Postsecondary Education Division, at (816) 891-8158.

Sincerely,

Thomas E. Esterly
Acting Regional Civil Rights Director
Office for Civil Rights
Department of Education, Region VII

Enclosures

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Southwest Missouri State
UNIVERSITY

Financial Aid
(417) 836-5262

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[illegible]

November 5, 1986

Mr. John Nigro
Office of Civil Rights
U.S. Department of Education
10220 North Executive Hills Blvd.
Kansas City, MO 64153

Dear Mr. Nigro:

Thank you for your willingness to assist and advise me during our telephone conversation of October 16, 1986. I write today in response to your invitation to review our minority scholarship proposal, and to request an opinion from your office.

Enclosed you will find a description of the program in draft form (enclosure 1). Also enclosed is a sample of the application form to be used with an addendum requesting further information about the applicant's eligibility and minority status.

Again, thank you for your willingness to provide assistance. Please call me if you have questions or require further explanation (417-836-4431).

Sincerely yours,

[redacted]

Scholarship Coordinator

enclosures

cc: [redacted] Affirmative Action Officer
[redacted] Chairman, SMSU Scholarship Committee

(Enclosure 1)

SMSU MINORITY LEADERSHIP SCHOLARSHIP

Preamble

Southwest Missouri State University has established the Minor: Leadership Scholarship for the purpose of attracting minority stude leaders to the SMSU campus. This scholarship program is in keep: with the University's Affirmative Action and Equal Opportun: objectives, and upholds the University's commitment to providing multi-cultural educational experience for its students.

In view of the University's position as stated above, and in keep with Federal codes prohibiting discrimination on the basis of ra color, sex, handicap, religion, or national origin, the follow guidelines have been established.

1. Twenty scholarships equal in value to the incidental fee two semesters will be available beginning with the 1987 f semester.

2. The scholarship applicant must be eligible for admission as new freshman to SMSU and plan to enroll by August, 1987.

3. Applicants shall submit an up-to-date high school transcr and must rank in the top half of the graduating high school cl to be considered.

4. Student must arrange for two letters of recommendation to sent by individuals who know the student well, preferably h school teachers, counselors, or others from the community.

5. Applicant must possess a record of superior leadership in minority community and describe his or her accomplishments the SMSU Freshman Scholarship application. Students shall selected for the award on the basis of participation in h school and community activities including, but not limited Student Government, National Honor Society, student organizatio Varsity Athletics, Religious organizations, community serv organizations, newspaper or yearbook staff, Dramatics, Deba or Music groups. Other awards and honors will also be considere

student organizations, Varsity Athletics, Religious organizations, community service organizations, newspaper or yearbook staff, Dramatics, Debate, or Music groups. Other awards and honors will also be considered.

6. Applicant must be a citizen of the United States.

7. Students who are members of an historically underrepresented minority groups are strongly encouraged to apply.

8. This scholarship is renewable for recipients who complete 30 hours in the academic year (fall, spring and summer semesters) and maintain a cumulative grade point average of 3.00 or higher. Service to the University and the community will also be considered.

Selection will be made by the SMSU Scholarship Committee or its appointed representative and will be based on academic success, leadership potential (as demonstrated by the students' record of participation in organizations and activities), and minority status. A student's minority status will not effect his or her eligibility for this award.

Dartmouth College HANOVER · NEW HAMPSHIRE · 03755
Office of the President

Affirmative Action Officer
(603-646-3197)

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OFFICE FOR CIVIL RIGHTS
DEPT OF EDUCATION

December 18, 1987

Dr. Thomas J. Burns, Regional Civil Rights Director
U.S. Department of Education, Region 1
John W. McCormack Post Office and
Courthouse Building
Room 222
Post Office Square
Boston, MA 02109

Dear Dr. Burns,

I am writing to request a Technical Assistance response from your office regarding a proposal Dartmouth College is currently considering which involves the College administering an award to be presented annually by a U.S. Corporation to a minority Dartmouth undergraduate student. I have spoken to attorney Steven McDonald in your office about this proposal and he has suggested that I write to you requesting a formal Technical Assistance response.

The issue of concern here is whether the proposed award would be considered discriminatory since only minority students would be eligible to apply and receive the award. Let me set out for you the pertinent facts, as proposed, regarding the objectives of the award as well as the criteria and process for the application and receipt of the proposed award.

The framework for the proposal, which is entirely at the corporations initiative, is the corporations concern over their declining ability to attract Dartmouth graduates into the sales area of their company. The corporation wants to raise its profile on campus by initiating this award and by creating internship opportunities for undergraduates in sales.

The objectives of the proposed award include:
- to reward students for academic excellence and leadership as undergraduates
- to enhance the relationship between Dartmouth and the corporation and
- to demonstrate how students may apply their education after graduation

The criteria for the proposed award are:
- the recipient must be a member of the junior class at Dartmouth
- the recipient must be in the top 25% of his/her class academically
- the recipient must be a U.S. citizen of Afro-American,

American Indian or Hispanic-American descent
- the recipient must have demonstrated leadership ability
- the award will be $1,000 annually

The process for the implementation of the proposed award is:
- that Dartmouth College, through the Dean of the College Office, will notify minority students of the proposed award on an annual basis and solicit applications
- that Dartmouth College, through the Dean of the College Office, will select a recipient each year and inform the corporation of the winner by April 1 each year
- that a corporate representative will present the proposed award each year at a suitable spring term awards ceremony
- that the proposed award will be posted and displayed to the student body with the same prominence as other awards made by the College
- that the student receiving the proposed award will be invited to attend a corporate Sales Meeting following the presentation of the award
- that there will be no requirement that the award recipient attend a sales meeting or entertain any employment offer from the corporation
- the corporation would like to make the first award in the spring of 1988

The corporation desires to be very flexible about the terms of the award and to conform to any policy or other considerations that the College may wish to apply. However, since the corporation is particularly interested in minority focus, we could not abandon that and still have the award. Short of this, however, we would be happy to negotiate with them on issues of concern that you may feel exist.

The College will be delaying the implementation of this award until receipt of your advice. The hope was, as stated above, to present the first award in the Spring of 1988. This would necessitate the announcement of the award and solicitation of interested students beginning soon after the 1st of the year. Therefore, we are hoping that we can have a response from you as soon as possible. We would welcome suggestions as to how the proposed award could be restructured to meet any of your concerns.

If you need any further information in order to determine whether this proposal is in compliance with regulations implementing Title VI, please feel free to contact me.

Sincerely,

[redacted]

Acting Affirmative
Action Officer

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3. DEPARTMENT OF EDUCATI(

March 17, 1988

[redacted]
Acting Affirmative Action Officer
Office of the President
Dartmouth College
Hanover, New Hampshire 03755

Dear Ms [redacted]

This letter serves to follow-up on our last telephone conversation of March 1st regarding the proposal you received from the U.S. Corporation to provide an annual award to a minority Dartmouth undergraduate student.

As I mentioned in our conversation Terry Pell, the Deputy Assistant Secretary for Policy in the U.S. Department of Education's Office for Civil Rights, has given considerable thought to this request. In his judgment, this type of award specificity could have the potential for litigation at Dartmouth or elsewhere, therefore, we want to be sure the procedure offered protects the student and the college as well as the donor.

Accordingly, Terry has suggested for your deliberation that said award be geared more to the economically disadvantaged with an emphasis on minority students.

To reiterate once again, [redacted] please know that Terry Pell is willing to travel to Dartmouth to meet with school officials and the representatives from the potential sponsoring organization if it is deemed advantageous.

We trust the time used on consideration of this matter has not hindered, but rather, that it has helped to set the stage for a meaningful and beneficial long term relationship with your donor in behalf of disadvantaged students that will attend Dartmouth.

Sincerely,

Thomas J. Burns
Thomas J. Burns
Regional Civil Rights Director
Office for Civil Rights
U.S. Department of Education

cc: Terence Pell
Acting Deputy Assistant Secretary
for Policy

[redacted]
Foundation and Corporation Relations
Dartmouth College

FILE COPY

	SURNAME	DATE	OFFICE	SURNAME	DATE	OFFICE	SURNAME	DATE

TECHNICAL ASSISTANCE - ADDITION

On April 8 a follow-up meeting was held at the Regional Office with a representative of Dartmouth College; [redacted], Associate Director for Foundation and Corporate Relations, and [redacted], District Manager for Procter and Gamble. Mr. Terry Pell, Deputy Assistant Secretary for Policy from OCR was also in attendance.

The purpose of the meeting was to secure an understanding from [redacted] on his company's desire to provide an annual scholarship to a Dartmouth student from the Junior Class who was in the upper 25% of the class academic ranking.

The original intent, as reported by the college, was to provide such a scholarship to a race or national origin minority student. During our meeting the pros, cons and alternatives were discussed in detail. As a result, there was a consensus that:

1) a minority oriented scholarship may not best serve either Procter and Gamble's interest or the college's.

2) a better way to go was a scholarship weighted toward:

   - academic excellence
   - demonstrated financial need and,
   - leadership potential

3) still keep Dartmouth as the overseer of the scholarship and that it be a one-person, one year award with a possible five year commitment by Procter and Gamble.

4) this year's desire to commence would be postponed until next year in light of (a) other controversial happenings at the college and (b) the need to take the necessary time to work out a sound set of procedures.

Follow-up technical assistance offered:

1) Terry Pell would check out the applicability of using a U.S. Citizen definition of and for eligibility use "employable in the U.S. workforce."

2) OCR would be willing to review and comment on future scholarship criteria developed for the Procter and Gamble award.

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS
REGION IV
POST OFFICE BOX 1705
ATLANTA, GEORGIA 30301

MAY 4 1989

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

[redacted]
President
David Lipscomb University
Granny White Parkway
Nashville, Tennessee 37203

Dear Dr. [redacted]

Re: Complaint Number: 04-89-2021

The Office for Civil Rights (OCR) has completed its investigation of the above-referenced complaint filed against David Lipscomb University (DLU). The complaint was filed pursuant to Title VI of the Civil Rights Act of 1964 (Title VI), 42 U.S.C. Sections 2000d et seq., and its implementing regulation at 34 C.F.R. Part 100, which prohibit discrimination on the basis of race in any program or activity receiving Federal financial assistance. DLU is a recipient of Federal financial assistance and is, therefore, subject to the requirements of Title VI. The complainant alleged that her daughter, [redacted], was discriminated against on the basis of race in the final grade she received in an American Literature class. The complainant further alleged that black students are subjected to different treatment in room reassignments and scholarship awards based on race. The complainant also alleged that DLU does not recruit black students.

OCR conducted an on-site investigation of this complaint on February 28, 1989, through March 2, 1989. Our investigation included a review of files and interviews with DLU officials, staff and students. We also conducted telephone interviews with students, the complainant, her daughter, and others. Based on the information obtained, we determined that DLU did not violate Title VI with regard to grading, room reassignments, recruitment of black students, and the awarding of memorial and leadership scholarship funds. However, we determined that DLU violated Title VI because the criteria established by DLU's Admissions Committee for the memorial scholarships treats black students who receive the Burton-Keeble Scholarships #2 and #3 differently from students who receive the other memorial scholarships. We also determined that DLU violated Title VI with respect to its administration of the Jamison Scholarship and Loan Fund, a scholarship restricted to white males from Tennessee.

DLU provided a letter of assurance dated April 27, 1989, that it would correct the violations which were cited. Based on the assurance provided, we are closing this case as of the date of this letter. The factual and legal bases for our determination are set forth below.

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Grading

The complainant alleged that her daughter received a final grade of F in her American Literature class because she was black. The complainant's daughter attributed the failing grade to the instructor's failure to provide her with assistance. The regulation implementing Title VI at 34 C.F.R. Section 100.3(a) and (b)(1)(v) prohibits a recipient from treating an individual differently from others in determining whether an individual satisfies any admission, enrollment, quota, eligibility, membership or other requirement in order to receive any service, financial aid or benefit on the basis of race.

[redacted] was the instructor for American Literature I for the fall 1988 semester. The class consisted of one black and 34 white students. On the first day of class, the instructor handed out the course syllabus to students. The syllabus listed the required readings and the dates of two exams. The final exam is scheduled by the Registrar's Office. The syllabus also contained general information about the instructor's attendance and tardiness policy. It explained how pop quizzes were averaged into the the final grade, and it informed students of the grading scale.

The instructor drops the lowest quiz score, and the final grade for the course is derived from the average of the quiz scores, which is counted as one exam, and from the other three exams. A score below 70 results in a final grade of F.

In calculating the final grades for the class, the instructor stated that he made an exception to his written policy because the grades were low. The instructor calculated the quiz scores for each student and only included the quiz average if it helped the final grade. The instructor rounded off to the next highest grade if a student was .5 point from receiving it.

Two students received a failing grade in the course, the complainant's daughter and one white student. Their grade averages were 65 and 66, respectively. OCR found that the two students were treated in the same manner in that their quiz averages were not calculated into their final grade. Because the complainant's daughter alleged that the instructor failed to provide her with assistance, OCR also investigated that issue.

The complainant's daughter stated that she asked the instructor for assistance one time. When she went by the instructor's office, he was talking to some other students. Once the other students left, she asked the instructor for help, and he refused. The complainant's daughter stated that she wrote him a letter asking for help and he did not respond; however, she was unable to provide OCR with a copy of the letter. She stated that the instructor had it.

The instructor stated that he provided the complainant's daughter with assistance when she came by his office. He assisted her in figuring out her average and gave her pointers on how to study. The instructor stated that he remembered the letter which the complainant's daughter sent to him. He recalled that the letter stated that she would try harder to raise her grades. He did not remember the letter asking for assistance, and he did not keep the letter.

Because the complainant's daughter was the only black student enrolled in the class, OCR interviewed a former black student and a black student currently enrolled in the instructor's class. OCR also interviewed five white students who were in the complainant's daughter's class. Of the students interviewed, one black and one white have asked for and received assistance. The students interviewed stated that they felt that the instructor treats black students the same as white students.

OCR also reviewed final grades of black students enrolled in the instructor's classes from fall 1986 to spring 1988. Of the 14 black students enrolled in his classes, only one black (the complainant's daughter) failed his course.

Because the exchange between the complainant's daughter and the instructor was verbal and no witnesses were present, OCR could not verify whether the instructor refused to provide the complainant's daughter with assistance; however, OCR found no evidence to indicate that the instructor provides assistance to whites while denying it to blacks. Additionally, OCR found that the instructor did not discriminate against the complainant's daughter because of her race when he assigned her a grade of F in American Literature I. Therefore, we find that DLU did not violate the regulation implementing Title VI at 34 C.F.R. Section 100.3(a) and (b)(1)(v) as it relates to this issue.

Room Reassignments

The complainant's daughter alleged that two black students living in Fanning Dormitory requested a room change and the Head Resident denied the request. The students, however, were given another room across the hall from the room they had originally requested. The complainant's daughter alleged that they were not given the room they requested because they are black.

The regulation implementing Title VI at 34 C.F.R. Section 100.3(a) and (b)(1)(ii), (iii) and (iv) prohibits a recipient from providing any service, financial aid or other benefit to an individual which is different or provided in a different manner from that provided to others on the basis of race. A recipient is also prohibited from restricting an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, financial aid or benefit on the basis of race.

DLU personnel stated that room reservations and selections are made early in the spring semester. Priority is given to a student who wishes to remain in the same space for the fall and spring semesters, and to rising seniors, juniors and sophomores. After initial assignments are made, new students are placed in the resident halls according to the dates on their housing applications. Each student is placed in the dormitory requested as long as space is available. When the dormitory becomes full, the student is placed in the next available dormitory. Students requesting a particular roommate must make sure that the other person has made the same request in order for the request to be approved by the Housing Department. Requests for room reassignments are handled by the Head Residents at each dormitory and are subject to availability of the desired room.

[redacted]

Most of the black female students reside in Fanning Dormitory, which has 15-20 black students. The Head Resident at Fanning Dormitory has been employed since fall 1988.

DLU personnel stated that a student who wishes to change her roommate or room assignment should see the Head Resident. Requests for room changes are approved only if both roommates agree to the change. Room changes are approved on a first-come, first-serve basis provided the room is vacant. Requests for a particular floor are handled in the same manner.

During the 1988-89 school year, approximately 11 requests for room reassignments were made to the Head Resident at Fanning. Seven requests were made the first semester, and all but one request, which was made by two black students, were approved. Two black students requested room 214-2 for the second semester because the occupant, who was also black, was graduating; however, a white student had allegedly already requested the room, so the black students' request was denied. Room 214-1, which is across from room 214-2, became available and the two black students were given that room.

OCR interviewed the two black students concerning the matter. They stated that the past policy had been that a student made a request for room reassignment through the Housing Department or moved in with the current occupant and then requested the room. One student stated that the dormitory residents were not informed of a policy change. They went to the Housing Department and were told to see the Head Resident. They stated that, when they asked the Head Resident about moving into the room or one of them moving into the room with the occupant, they were informed that the room had been reserved. Both students felt that the room reassignment policy was changed because they wanted to change rooms.

The Dean of Students stated that, to his knowledge, there never has been a policy where students wanting room reassignments could make them through the Housing Department. He stated that the Housing Department is responsible for making initial housing assignments and any other changes are between the student and the Head Resident. The Head Residents are given the freedom to develop their own policies.

The Head Resident stated that Fanning Dormitory's room policy has been in place for several years. The reassignment requests are made informally to her, and no records are kept of each request. The Head Resident denied that the students requested the room in the manner which they described to OCR. She stated that they told her that they wanted to move into the room. If a student wanted to get a room by moving in with another student who was graduating, she would have to "play it by ear" on how she would handle the matter. She did not elaborate any further on this issue.

OCR conducted an on-site inspection of rooms 214-1 and 214-2 to determine whether they were comparable. We found that the rooms were the same except that room 214-2 was painted blue. The Head Resident stated that students are allowed to paint their rooms.

For the second semester, four requests were made for room reassignments, and all were approved. One black student made a request which was approved.

OCR interviewed black and white student residents of Fanning Dormitory to determine whether blacks were treated differently from whites in room reassignments. The students who were interviewed stated that they did not have any problems; nor were they aware of any problems in receiving room reassignments based on race.

Although there is disagreement as to who requested the room first, and the manner in which the request was made, OCR could not substantiate any of the claims because no records were kept and no witnesses were present. However, the evidence does not establish any pattern of disparate treatment towards black students in room reassignments. Therefore, OCR finds that DLU did not violate the regulation implementing Title VI at 34 C.F.R. Section 100.3(a) and (b)(1)(ii), (iii) and (iv) with respect to this issue.

Recruitment

The complainant alleged that DLU does not recruit black students. The regulation implementing Title VI at 34 C.F.R. Section 100.3(a) and (b)(1)(ii) prohibits a recipient from providing any service, financial aid or other benefit to an individual which is different or provided in a different manner from that provided to others on the basis of race.

DLU identifies prospective students through ACT and SAT lists, Merit Scholarship announcements, the Metropolitan Board of Education for Davidson County, faculty members, and members of the Church of Christ. The Director of Recruitment, who is black, is responsible for recruiting students and is assisted by three counselors. The recruitment area includes the southeast, southwest, east and mid-west regions of the United States.

In recruiting for the 1988 school year, the counselors made approximately 195 visits, which included visits to seven predominately black schools and three black churches. For the first quarter of 1989, the counselors have made 27 visits, which included one black school. At the time of OCR's on-site investigation, the Director of Recruitment was preparing to visit a black junior college in Texas.

In addition to visitations, DLU also employs other on-going activities to recruit black students. Counselors send letters and recruitment brochures to seniors at the black-populated high schools in Nashville. Counselors visit college fairs, and DLU students visit high schools and area churches. DLU has had telephone parties during which current students call prospective students to generate interest in the institution. For spring 1989, DLU scheduled tours of the campus. For example, 12 black students from area high schools were to have visited the campus the first weekend in March.

DLU discussed other measures implemented to attract black students. In December 1988, DLU invited black ministers to a dinner in an effort to involve the churches in the recruitment effort. In January 1989, the Director of Recruitment met with the Brotherhood of the South, which is a black organization of ministers and elders of the Church of Christ (Church). The organization requested a meeting with DLU's President which was held in February. The Vice-President of Campus Affairs, Dean of Enrollment and Retention, and Director of Recruitment were also present. As a result of the meeting, a black educator/minister agreed to participate on the lectureship committee for summer programs.

In student interviews, OCR found that the majority of students were either recruited by the Church or had relatives who attended DLU. One black student was recruited by a missionary and another black student was recruited by DLU because of her athletic ability. One black student was a student recruiter who had participated in calling parties to recruit new students.

The evidence shows that DLU has initiated measures to increase black enrollment. Therefore, OCR finds that DLU did not violate the regulation implementing Title VI at 34 C.F.R. Section 100.3(a) and (b)(1)(ii) with respect to this issue.

Memorial Scholarships

The complainant alleged that black students are allowed to receive only the memorial scholarship designated for black students, the Burton-Keeble Scholarship. The regulation implementing Title VI at 34 C.F.R. Section 100.3(a) and (b)(1)(ii) (previously cited) provides the standard for compliance in this area.

DLU has approximately 129 memorial scholarships available to students of which 31 (24%) are restricted to males and 9 (7%) are restricted to females. Three scholarships are restricted by race: the Burton-Keeble Scholarships #2 and #3 are designated for black students, and the Jamison Scholarship and Loan Fund is designated for white males from Tennessee.

Students must apply for memorial scholarships annually. The Admissions Office receives the scholarship application and places a copy in the pending memorial scholarship folder. In June and July, the applications are reviewed. The Admissions Office works with the Financial Aid Office in determining an applicant's need because the majority of the scholarships are need based. They use the same financial need analysis form which is used in awarding Pell Grants to determine an applicant's financial need. They start with students demonstrating the greatest financial need and match them with the stipulations placed on each scholarship by the donor. Students are not limited in the number of memorial scholarships they can receive.

[redacted]
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DLU stated that black students are steered to the Burton-Keeble Scholarship because it offers more money than the other memorial scholarships. If financial need still exists, black students are also considered for the other memorial scholarships. OCR found that even though blacks are steered to the Burton-Keeble Scholarship, it has no adverse impact on the amount of funds they receive when compared to whites. In 1987, the average award for blacks was $2,421, and the average award for whites was $1,586. In 1988, the average award for blacks was approximately $1,496, and the average award for whites was approximately $950.

The file review revealed that black and white students were treated in the same manner in determining whether they met the eligibility requirements for memorial scholarships. Black as well as white students were rejected if they did not have a financial need.

OCR found that the criteria established by the Admission Committee for memorial scholarships treats black students who receive the Burton-Keeble #2 and #3 differently from students who receive the other memorial scholarships. Black students are required to carry a minimum of 14 semester hours to receive any part of the award while students receiving other memorial scholarships can carry a minimum of eight semester hours and still receive one-half of the award. Black students are prohibited from marrying, while students receiving other memorial scholarships are not.

OCR finds that DLU did not violate the regulation implementing Title VI at 34 C.F.R. Section 100.3(a) and (b)(1)(ii) in its administration of the memorial scholarship awards because it does not adversely impact the amount of funds black students receive when compared to that which whites receive or the number of black students who receive such funds. OCR did find that DLU violated the regulation implementing Title VI at 34 C.F.R. Section 100.3(a) and (b)(1)(ii)-(v) which prohibits a recipient from treating an individual differently or subjecting an individual to separate treatment in receiving any service, financial aid or benefit on the basis of race. The criteria established by the Admissions Committee treats black students who receive the Burton-Keeble Scholarships #2 and #3 differently than students who receive the other memorial scholarships.

Leadership Scholarships

The complainant alleged that black students are not allowed to receive leadership scholarships and that her daughter applied for a leadership scholarship and was rejected. The regulation implementing Title VI at 34 C.F.R. Section 100.3(a) and (b)(1)(ii) (previously cited) provides the standard for compliance in this area.

Approximately 10 leadership scholarships are available to incoming freshmen each year of which approximately 3 are designated as art scholarships. Applicants with the greatest number of offices held in various clubs in high

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school are chosen to receive the award. Students who receive a leadership scholarship are not eligible for a honors scholarship. Applicants check the leadership scholarship and/or special achievement line on the scholarship application.

For 1987, 5 black students and 112 non-black students applied for leadership scholarships. A criterion to receive the award was that a student must have held five or more offices. As a result, no black students met the criterion to receive the award. Eight non-black students received the scholarship awards.

For 1988, 7 black students and 61 non-black students applied for leadership scholarships. The awards were made to those students who held six or more offices. As a result, no blacks met the criterion to receive the award. Eight non-black students received the scholarship awards.

OCR conducted a random sampling of the leadership scholarship recipients for the 1987 and 1988 school years to determine whether they met the minimum qualifications. We found that all the recipients met the minimum qualifications for the two years in question. OCR also compared the qualifications of the non-black recipients of the leadership scholarships to the qualifications of the black students who applied for the scholarship and were rejected. We found that the non-black recipients listed the offices they held on their applications whereas most black applicants listed only their activities.

The complainant's daughter applied for a leadership scholarship in 1987 and 1988. In 1987, she listed 12 activities on her application but only three offices held and church participation. In 1988, she listed four activities; however, she was a sophomore and no longer eligible for the scholarship.

OCR found no evidence to indicate that DLU discriminates against black students in its administration of the leadership scholarships. Students holding the highest number of offices are chosen to receive the scholarships; therefore, OCR finds that DLU did not violate the regulation implementing Title VI at 34 C.F.R. Section 100.3(a) and (b)(1)(ii) with respect to this issue.

Although it was not part of the complaint, OCR found that DLU offers the Burton-[illegible] Scholarships #2 and #3 to black students and the Jamison Scholarship and Loan Fund to white males from Tennessee. We examined the issue of whether DLU could offer race-restrictive scholarships. The regulation implementing Title VI at 34 C.F.R. Section 100.3(a), (b)(1)(i)-(v) (previously cited), (6)(i) and (ii) provides the standard for compliance in this area.

The regulation implementing Title VI at 34 C.F.R. Section 100.3(b)(6)(i) and (ii) states that a recipient who has previously discriminated against persons on the basis of race, color, or national origin must take affirmative action to overcome the effects of prior discrimination. Even in the absence of such prior discrimination, a recipient may take affirmative action to overcome the effects or conditions which limit the participation by persons of a particular race, color, or national origin.

OCR found that, in the past, blacks were prohibited from attending DLU, formerly David Lipscomb College. The Nashville Christian Institute (NCI) was established for the black students to attend. NCI was sold in the 1960's and the proceeds from the sale were given to DLU to establish the Burton-Keeble Scholarships #2 and #3 for black students.

OCR reviewed DLU's undergraduate enrollment from 1985 to 1988. We found that black undergraduate enrollment decreased from 2.4% in 1985 to 2.1% in 1986; however, it increased from 2.4% in 1987 to 2.5% in 1988. Despite the slight increase in black undergraduate enrollment, blacks still represent less than three percent of the total undergraduate enrollment, while whites represent more than 96% of the total undergraduate enrollment.

OCR finds that DLU is taking affirmative action to overcome the effects of prior discrimination against blacks by administering the Burton-Keeble Scholarships #2 and #3; however, we find that the Jamison Scholarship and Loan Fund, which is designated for white males from Tennessee, does not meet the above-referenced criteria. Whites have not been previously discriminated against by DLU and the conditions of DLU's programs have not resulted in limited participation by whites. Therefore, OCR finds that DLU violated the regulation implementing Title VI at 34 C.F.R. Section 100.3(a), (b)(1)(i)-(v), (6)(i) and (ii) because DLU administers the Jamison Scholarship and Loan Fund, a scholarship for white males, in a discriminatory manner.

OCR also found that DLU's application for admission contains a pre-admission inquiry as to the race of the applicant. Recipients may inquire as to the race of an applicant if the response is voluntary and it is clearly stated on the application form that the information will not be used as a factor in the admissions process. DLU's application form does not indicate that the information is voluntary nor does it specify the intended use of the information.

Subsequent to the on-site investigation, DLU and OCR successfully negotiated a corrective action plan. By letter dated April 27, 1989, DLU submitted an assurance that corrective actions would be implemented. DLU assured OCR that it will:

1. Revise its undergraduate admissions application to make the pre-admission inquiry as to the race of an applicant optional. The application will also contain the statement that the information is "for statistical purposes only."

2. Revise the requirements of the Burton-Keeble #2 and #3 Scholarships to ensure that black students are treated comparably to students who receive other memorial scholarships. This will entail DLU providing Burton-Keeble #2 and #3 recipients with one-half of their award if they carry between 8 and 13 semester hours and deleting the marriage restriction.

3. Delete the race restriction on the Jamison Scholarship and Loan Fund.

[redacted]
Page 10

Continued compliance is contingent upon implementation of the corrective action plan. Failure to implement the plan may result in a violation. In order that OCR may monitor DLU's progress in implementing its plan of action, DLU will provide OCR with the following information:

1. A copy of the revised admissions application by July 15, 1989.
2. A copy of the award letter which is mailed to Burton-Keeble Scholarship recipients by June 30, 1989.
3. A copy of the letter of agreement stating that the Jamison Scholarship and Loan Fund has deleted the race restriction by June 30, 1989.

This letter of findings is not intended to cover any other issues regarding compliance with Title VI that may exist and are not discussed herein. We must remind you that retaliation or harassment against any person who has filed a complaint, participated in, or has cooperated with our investigation is prohibited.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. In the event that OCR receives such a request, we will seek to protect, to the extent provided by law, personal information which, if released, could constitute an unwarranted invasion of privacy.

We appreciate your cooperation during the investigation and resolution of this complaint. If you have any questions, you may contact Mr. Louis O. Bryson, Sr., Director, Postsecondary Education Division, at (404) 331-2806.

Sincerely,

Jesse L. High
Regional Civil Rights Director

SEP 28 1989

Re: 08892024

[redacted]
President
University of Colorado
Office of the President
Campus Box 35
Boulder, Colorado 80309

Dear President [redacted]

The Office for Civil Rights (OCR) has completed its investigation of the complaint filed against the University of Colorado, a recipient of Federal financial assistance from the U.S. Department of Education. The investigation was conducted pursuant to Title IX of the Education Amendments of 1972, 20 U.S.C. 1681, 1682, and its implementing regulation at Title 34, Code of Federal Regulations (C.F.R.), Part 106, and Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, and its implementing regulation at Title 34 C.F.R. Part 100. The complainant alleged that the School of Medicine unlawfully discriminated against white female medical students by excluding them from consideration as candidates for the Patricia Roberts Harris Fellowship.

OCR investigated the following issue:

> whether the School of Medicine, on the bases of race and sex, unlawfully limited eligibility, applied different criteria, or otherwise discriminated against white female candidates for the Patricia Roberts Harris Fellowship. [34 C.F.R. §106.37(a)(1), §100.3(b)(1), and §100.3(b)(6)]

This letter serves to advise you officially of our findings regarding this issue and the bases for our conclusions.

The Patricia Roberts Harris Fellowships provide Federal assistance to enable postsecondary institutions to make available fellowship awards in post-baccalaureate education to graduate and professional students who demonstrate financial need. Graduate and professional

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study fellowships are awarded to individuals from groups that are traditionally underrepresented in graduate and professional study and who can demonstrate financial need. The Harris Fellowship program is administered by the University of Colorado Health Sciences Center's Office of Minority Student Affairs.

The School of Medicine received funding from the U.S. Department of Education for one Harris Fellowship. A Harris Fellowship selection committee was formed to evaluate the candidates and select a recipient for the Fellowship. Based on historical enrollment and graduating data, the committee determined that significant numbers of white females had been enrolled in and have graduated from the School of Medicine. Similar historical data confirmed that blacks, Hispanics, and Native Americans had been traditionally and continued to be underrepresented groups among students enrolled in and graduating from the School of Medicine. For these reasons, the committee decided to limit consideration for awarding the one Fellowship funded to entering freshman minority medical students.

OCR sought to determine whether the Harris Fellowship committee's decision to limit consideration for the Harris Fellowship to minority students constituted unlawful discrimination on the basis of sex. The data and records reviewed by OCR indicated that four minority females were among the twelve candidates considered. Since not all females were excluded from consideration for the Harris Fellowship, this does not constitute differential treatment on the basis of sex within the meaning of 34 C.F.R. §106.37(a)(1).

OCR sought to determine whether the committee's decision to limit consideration for the Harris Fellowship to minority students constituted unlawful discrimination on the basis of race. Regulation 34 C.F.R. §100.3(b)(6) allows recipients to take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color, or national origin. Enrollment and graduation data substantiated the traditional underrepresentation of blacks, Hispanics, and Native Americans, and the significant numbers of white females, enrolled in and graduating from the School of Medicine. The Health Sciences Center identified the high cost of matriculating at the School of Medicine as one of the conditions which resulted in limiting the participation of minorities in the medical school program.

For these reasons, OCR found that the Harris Fellowship committee's decision to limit consideration for the Harris Fellowship to minority students was permissible affirmative action under 34 C.F.R. §100.3(b)(6).

OCR reviewed the Harris Fellowship committee's screening procedures and found no evidence of disparate negative impact on the bases of race, color, national origin, or sex.

Based on the information presented in this letter, OCR concludes that the University of Colorado is in compliance with 34 C.F.R. §106.37(a)(1), §100.3(b)(1), and §100.3(b)(6) with respect to this complaint. We are therefore closing this case effective the date of this letter.

This letter addresses only the issue investigated by this complaint investigation and should not be construed as a determination of the University of Colorado's compliance with Title IX or Title VI in any other respect. The findings and conclusions in this letter are based upon the applicable provisions of the Title IX and Title VI implementing regulations and OCR policy.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. In the event that OCR receives such a request, we will seek to protect, to the extent provided by law, personal information which, if released, could constitute an unwarranted invasion of privacy.

We wish to thank you and your administrators and staff for the cooperation extended to our investigator during the investigation. If you have any questions, you may contact me at (303) 844-[illegible], or your designee may call Mr. Ramon F. Villarreal, Director, Compliance Enforcement Division, at (303) 844-2991.

Sincerely,

Gilbert D. Roman, Ed.D.
Regional Director

cc: [redacted]
Chancellor

[redacted]
Dean, School of Medicine

[redacted]
Director, Affirmative Action

[redacted]
University Counsel

MEMORANDUM

UNITED STATES DEPARTMENT OF EDUCATION
WASHINGTON, D.C. 20202

OCT 29 1990

TO : Gary D. Jackson
Regional Civil Rights Director
Region X

Richard D. Komer

FROM : Richard D. Komer
Deputy Assistant Secretary
for Policy

SUBJECT: Oregon State Board of Higher Education. No. 10902015 - Policy Review

Headquarters staff has reviewed the investigative report, letter of findings (LOF), and supporting legal memorandum for the above-referenced complaint, which you forwarded on July 26, 1990. We concur in your proposed finding that the tuition and fee waiver provisions of the Oregon State Board's Minority Student Enrollment Initiative (Initiative), which excludes persons solely on the basis of race, violates Title VI of the Civil Rights Act of 1964 and 34 C.F.R. §§ 100.3(a), (b)(1) and (b)(2) (1989).

As we have discussed, this case involves policy issues that are currently being considered by headquarters staff. You should conduct your pre-LOF negotiations consistent with the following guidance.

First, OCR will continue to rely upon the Supreme Court's decision in Regents of the University of California v. Bakke, 438 U.S. 265 (1978), and City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989), when determining the validity of affirmative action programs, as well as the HEW policy document entitled Nondiscrimination in Federally Assisted Programs; Title VI of the Civil Rights Act of 1964; Policy Interpretation, 44 Fed. Reg. 58,509 (1979) (OCR Policy Document #17). Student body diversity is a sufficient basis upon which a recipient's race-conscious affirmative action program may rest. See Metro Broadcasting v. Federal Communications Commission, 110 S.Ct. 2997 at 3010 (1990) (quoting Bakke).

Second, as discussed in Bakke (at 308, 312-15) and as pointed out in your legal memorandum, student body diversity is more than mere racial balancing. The goal of achieving a particular percentage of minority students within a student body was rejected in Bakke because this is "discrimination for its own sake," and therefore unconstitutional. Id., at 308. However, race may be a factor in a program to achieve student body diversity (and thus promote the "robust exchange of ideas." Id., at 314) if the program "encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element." Id., at 315.

The first paragraph of the Oregon Minority Student Enrollment Initiative (the Initiative) cites the pursuit of a culturally diverse student body as its goal. However, the vast majority of the text of the Initiative, the Staff Report within which the Initiative appears, and the Region's interviews with Oregon officials demonstrate that the actual goal of the Initiative is to increase the enrollment of blacks, Hispanics, and Native Americans. The Initiative and the Staff Report do not mention diversity-related qualifications such as geographic origin, cultural or economic disadvantage, exceptional personal talents, unique experience, leadership, or an ability to overcome obstacles to success. The Board should be made aware of the meaning of achieving student body diversity, and this point should be emphasized in the pre-LOF negotiations and the LOF.

Third, a race-conscious affirmative action plan should be carefully tailored to achieve the stated objective. Accordingly, a program with diversity as its goal must meet the following standards.

a. All students must be permitted to participate.

b. The program must be free of quotas or inflexible goals. OCR will look to the outcome of the program as well as the recipient's description of the program in making this determination.

c. The program must be designed to permit individualized determinations of eligibility. Race may be only one of a variety of factors considered (see other diversity-related factors listed above).[1]

Our final point is related to the statistical evidence in this case. The complainant is alleging that Asians were unfairly excluded from the Initiative, which was available to only blacks, Hispanics, and Native Americans. Investigative Report, at 19 & 20. The statistics in the Investigative Report and draft LOF aggregate blacks, Hispanics, and Native Americans into one group and Asians and whites into another for purposes of analysis. To adequately address the complainant's allegation, disaggregated enrollment figures for blacks, Hispanics, Native Americans, Asians, and whites should be reviewed to verify whether Asians were in fact unfairly excluded. Additional comments have been noted in the margin of the draft LOF.

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[1] Race may be the deciding factor between generally comparable individuals.

Should negotiations fail and it become necessary to issue an LOF, the current draft should be amended in light of the above guidance and additional marginal notations on the draft LOF. Because of the policy implications of this case, you should submit any LOF to headquarters for review prior to issuance.

If additional guidance is needed, you should contact Jeanette Lim at 732-1645

Attachment

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS—REGION V
401 SOUTH STATE STREET — 7TH FLOOR
CHICAGO, ILLINOIS 60605

OFFICE OF THE
DIRECTOR

JUN 26 1989

[redacted]
Milwaukee Public Schools
5225 W. Vliet Street
Milwaukee, Wisconsin 53208

Re: #05-89-1063

Dear Dr. [redacted]

The Office for Civil Rights (OCR), U.S. Department of Education, has completed its investigation of the above-referenced complaint filed on March 13, 1989, against the Milwaukee Public Schools District (MPS). The Complainant alleged that MPS discriminates against female students attending the Milwaukee Trade and Technical High School on the basis of sex in violation of Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq*. Specifically, the Complainant alleged that MPS assists in the administration of a cash scholarship established by a will which restricts eligibility for the award to outstanding male students while providing no comparable stipends for female students. Additionally, the Complainant alleged that MPS has failed to inform her of complaint procedures or provide for the prompt resolution of her concerns regarding the scholarship issue.

OCR is responsible for enforcing Title IX and its implementing regulation at 34 C.F.R. Part 106 which prohibit discrimination on the basis of sex in programs and activities receiving Federal financial assistance. MPS receives funding from the U.S. Department of Education and is, therefore, subject to these provisions.

On the basis of evidence submitted by both the Complainant and MPS and testimony provided by relevant witnesses, OCR has determined that MPS has failed to ensure that the overall effect of its assistance in the administration of scholarships and awards, including the Sivyer Scholarship Awards, is not discriminatory against female students attending Milwaukee Trade and Technical High School. Additionally, MPS has failed to implement and disseminate Title IX grievance procedures that provide for the prompt and equitable resolution of complaints alleging actions prohibited under Title IX. Also, while MPS'

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parent/student handbooks indicate the telephone number of its Title IX Coordinator, the name and office address of the Coordinator is not included in its publications as required by Title IX. However, MPS has voluntarily provided OCR with assurances that, when implemented, will resolve the compliance problems identified. OCR, therefore, concludes that MPS is currently in compliance with Title IX regarding the issues raised in the complaint. We are, therefore, closing this case effective the date of this letter. The bases for OCR's determination are summarized below.

Regulatory Standards - Issue 1

The regulation implementing Title IX at 34 C.F.R. 106.37(a)(1) states that in providing financial assistance to any of its students, a recipient is prohibited from providing different amounts or types of such assistance, limiting eligibility for such assistance, applying different criteria or otherwise discriminating on the basis of sex. The regulation at 34 C.F.R. 106.37(b)(1) provides that a recipient may assist in the administration of scholarships or other forms of financial assistance established pursuant to domestic or foreign wills, trusts, bequests, or similar legal instruments or by acts of a foreign government which require that awards be made to members of a particular sex specified therein, provided that the overall effect of the award of such sex-restricted scholarships, fellowships, and other forms of financial assistance does not discriminate on the basis of sex.

In addition, under 106.37(b)(2), recipients are required to ensure nondiscriminatory awards of assistance by developing and using procedures under which:

(i) Students are selected for award of financial assistance on the basis of nondiscriminatory criteria and not on the basis of availability of funds restricted to members of a particular sex;

(ii) An appropriate sex-restricted scholarship, fellowship, or other form of financial assistance is allocated to each student selected under (b)(2)(i) above; and

(iii) No student is denied the award for which he or she was selected under (b)(2)(i) above because of the absence of a scholarship, fellowship, or other form of financial assistance designated for a member of that student's sex.

Facts, Analysis and Conclusion

The Complainant alleged that in Spring 1988, her daughter, a senior attending Milwaukee Trade and Technical High School, was nominated for a Sivyer Scholarship Award by her instructor in the cabinet-making trade class; however, her daughter was not considered for the Sivyer Scholarship Award because only male students are eligible to become recipients of the award. Further, the Complainant alleged that there are no comparable awards for female students.

Data submitted by MPS denoted that the Milwaukee Trade and Technical High School administers or assists in the administration of two sources of financial assistance available only to students attending the high school: the Trojan Scholarships and the Frederick W. Sivyer Scholarship Awards.

The investigation established that the Trojan Scholarships are derived from undocumented contributions from a variety of sources and are awarded to selected senior students annually. The amount of the scholarships is based on the availability of funds. In reviewing the eligibility requirements and the criteria for and method of selection, OCR found that the award of the Trojan Scholarships is based on objective, sex-neutral standards. While Trojan Scholarship applicant data is not routinely collected and maintained by Milwaukee Trade and Technical High School, the data submitted by MPS revealed that both male and female students have received Trojan Scholarships for the period between 1983 and 1988.

According to MPS, the Milwaukee Trade and Technical High School assists in the administration of the Frederick W. Sivyer Scholarship Awards, established in 1935 pursuant to a domestic will. According to the terms of the will, eligibility for the scholarship is restricted to "young men students" enrolled in "Boys Technical High School." The school began admitting female students in the early 1970's, and the school's name was changed to Milwaukee Trade and Technical High School. According to data submitted by MPS, the Sivyer Scholarships are currently awarded to senior male students, and the scholarship awards range from $1,200 to $1,500 per student annually.

The Complainant's daughter was among the senior students who were nominated by their shop instructors for the 1988 Sivyer Scholarship Award; she received the highest performance in the cabinet trade shop at the high school.

The Assistant Principal of Milwaukee Trade and Technical High School stated that the Complainant's daughter's name had been taken out of consideration because "the conditions of the Scholarship specify men only, as recipients." OCR was unable to determine how many female applicants would have received the Sivyer Scholarship Awards within the last five years but for the will provision limiting the award to male students, because neither Milwaukee Trade and Technical High School nor MPS collects or maintains data regarding students recommended by their instructors but not selected. Furthermore, instructors knowledgeable about the will provision may have declined to nominate otherwise qualified female students. Records supplied to OCR do confirm that between 1983 and 1988 all Sivyer awards have been given to male students.

In an OCR interview, MPS' Title IX Coordinator and the Assistant Principal of the high school indicated that the school may receive walk-in grants for one to two students per year; however, the school does not maintain records regarding these grants. Data submitted by MPS, augmented by interviews with MPS and high school staff, confirmed that Milwaukee Trade and Technical High School offers no comparable scholarships relative to dollar amount, number of awards and selection criteria for female students attending the high school. Further, the scholarship program conducted by MPS does not utilize procedures under which students are selected for awards on the basis of nondiscriminatory criteria and under which no student is denied an award for which he or she was selected because of the absence of sex-restricted scholarship funds.

Title IX and its implementing regulation, 34 C.F.R. 106.37(a)(1) and (b)(1) and (2), allow a recipient to offer sex-restricted scholarships and other forms of financial assistance provided that the overall effect of such awards does not discriminate on the basis of sex. Based on the evidence reviewed, OCR finds that MPS has failed to ensure that the overall effect of its assistance in the administration of the Sivyer Scholarship Awards is not discriminatory against female students attending Milwaukee Trade and Technical High School. MPS has failed to develop and use specific procedures to ensure nondiscriminatory treatment of female students in awarding financial assistance. As a result, OCR finds MPS in violation of 34 C.F.R. 106.37(a)(1), 106.37(b)(1) and (2)(i),(ii) and (iii).

Further, MPS has failed to collect or maintain data, by sex, pertaining to the applicants for the Trojan Scholarships, nominees for the Sivyer Scholarship Awards, and the number, amounts and recipients of additional walk-in grants for students at Milwaukee Trade and Technical High School. Therefore, OCR is now notifying MPS that pursuant to 34 C.F.R. 106.71 and 100.6(b), MPS is required to maintain this data to facilitate OCR's monitoring of compliance with Title IX. This information must be readily available and maintained to enable OCR to monitor MPS' full compliance with the Title IX regulation.

Regulatory Standards - Issue 2

Title IX and its implementing regulation at 34 C.F.R. 106.8(a) require that a recipient designate a person(s) to coordinate its efforts to comply with Title IX and carry out its responsibilities under Title IX including investigation of any complaints communicated to the recipient alleging noncompliance with the Title IX regulation. Students, parents/guardians and employees must be notified of the name, office address and telephone number of the Title IX Coordinator. The regulation at 34 C.F.R. 106.8(b) further requires that a recipient adopt and publish grievance procedures which provide for prompt and equitable resolution of complaints alleging any actions prohibited by Title IX.

Facts, Analysis and Conclusion

The Complainant's second allegation was that MPS failed to apprise her of formal Title IX complaint procedures or provide a prompt resolution to her concerns regarding the scholarship issue.

The evidence revealed that the Complainant's concerns with respect to MPS' administration of the Sivyer Scholarship Awards and the failure to consider her daughter for the award were verbally communicated to Milwaukee Trade and Technical High School and MPS personnel in June 1988. Based on interviews with school and MPS staff, the Complainant was neither referred to the designated person responsible for handling Title IX complaints nor apprised of formal, published Title IX complaint procedures.

OCR found that the only action taken by MPS following the Complainant's expression of her concerns was a request by MPS for a legal opinion from the Office of the City Attorney of Milwaukee. An opinion was issued in April 1989 indicating, in part, that the school's participation in the administration of the scholarship violated Title IX. Since receipt of that opinion, no action has been taken by MPS to discontinue or alter its involvement with the scholarship.

In the data submitted to OCR, MPS identified an employee as its Title IX Coordinator, but its 1988-89 parent/student handbook provides only a phone number. This is insufficient to comply with 34 C.F.R. 106.8(a), which requires that students and employees be notified of the name, office address and telephone number of the coordinator.

While MPS' 1986-87 handbook includes formal complaint procedures and timelines for resolution of Title IX complaints, the 1988-89 handbook only includes a policy statement of nondiscrimination. The regulation implementing Title IX at 34 C.F.R. 106.8(b) specifically requires recipients to adopt and publish grievance procedures for resolution of student and employee complaints under Title IX. OCR finds that MPS has not published grievance procedures in any publication currently being disseminated.

Hence, OCR concludes that MPS has failed to publish and follow written, workable Title IX grievance procedures that allow for expeditious resolution of Title IX grievances and has failed to publish the name and office address of its Title IX Coordinator, as required by Title IX and its implementing regulation, 34 C.F.R. 106.8(a) and (b).

Based on written assurances that MPS will implement the remedial actions set forth in the enclosed document, OCR considers MPS to be presently fulfilling its obligations under Title IX and its implementing regulation with respect to the compliance issues identified during this investigation. Thus, OCR is closing this complaint effective the date of this letter. Continued compliance, however, is contingent upon carrying out the enclosed assurances. Failure to implement these assurances may result in a finding of violation. As is our standard practice, compliance with commitments and assurances will be monitored by OCR in accordance with the time frames outlined in the assurances.

Under the Freedom of Information Act, 5 U.S.C. 552, it may be necessary to release this document and related correspondence and records upon request. In the event that OCR receives such a request, we will seek to protect, to the extent provided by law, personal information which, if released, could constitute an unwarranted invasion of privacy. This letter of findings and the enclosed document address only the issues discussed herein and should not be construed to cover any other issues regarding compliance with Title IX which may exist.

Further, individuals filing a complaint or participating in an OCR investigation are protected against harassment, intimidation, or retaliation under 34 C.F.R. 100.7(e), which is incorporated by reference in the Title IX Regulation at 34 C.F.R. 106.71.

OCR offers technical assistance with respect to questions you or your staff may have regarding any of the regulations enforced by OCR. If at any time such assistance is desired, please feel free to contact Ms. Catherine Condon, Technical Assistance Coordinator, Elementary and Secondary Education Division, at 312-886-4733.

We wish to thank you and your staff for the cooperation extended OCR throughout the course of this investigation. If you have any questions about our determination, please contact Ms. Sue Gamm, Director, Elementary and Secondary Education Division, at 312-353-2480.

Sincerely,

Kenneth A. Mines

Kenneth A. Mines
Regional Director

Enclosure

cc: [redacted]
State Superintendent of Education

ASSURANCES

To resolve the issues involved in complaint #05-89-1063, the Milwaukee Public Schools (MPS) agrees to the following assurances:

1. In administering the Sivyer Scholarship or any other scholarship, fellowship, or other form of financial assistance established pursuant to wills, trusts, bequests, or similar legal instruments, which require that awards be made to members of a particular sex, the Milwaukee Public Schools (MPS) will ensure that the overall effect of such sex-restricted awards does not discriminate on the basis of sex.

2. To ensure compliance with #1 above, by September 30, 1989, MPS will conduct an evaluation of its policies, procedures and practices governing the award of scholarships, stipends or other forms of financial assistance to MPS students. The evaluation will include, but need not be limited to, a review of the following materials:

   - all policies pertaining to the administration of financial assistance for students;
   - all legal instruments (or relevant portions thereof) establishing scholarships or other awards of financial assistance administered by MPS/schools;
   - all agreements with organizations or individuals providing financial assistance to students which are administered by the MPS/schools;
   - criteria for student eligibility/selection for all awards of financial aid;
   - student handbooks and any descriptive materials pertaining to financial assistance to students; and
   - any application materials used in the process of awarding financial assistance.

3. Based on the evaluation conducted pursuant to #2 above, MPS will develop procedures for the award of the Sivyer Scholarship and any other sex-restricted awards established pursuant to wills, trusts, bequests or similar legal instruments, which provide that:

   a. Preliminary selection of students for such awards by MPS' selection committees is made on the basis of nondiscriminatory criteria and not on the basis of availability of funds restricted to members of a particular sex;

b. An appropriate award is allocated to each student who meets the nondiscriminatory preliminary selection criteria as described under #3a, above; and

c. No student is denied the award for which he or she met the preliminary selection criteria as described under #3a because of the absence of an award or other form of financial assistance designated for a member of that student's sex.

The procedures will include provisions for notification to students, parents/guardians and staff that awards of scholarships and other financial assistance will not discriminate on the basis of sex, revision of application materials, where necessary; and appropriate recordkeeping with respect to the award of scholarships or other forms of financial assistance to students.

4. By November 15, 1989, MPS will submit to OCR for review a copy of the evaluation and procedures.

5. Within 30 days after notification by OCR that the evaluation and procedures are acceptable, MPS will implement the procedures.

6. MPS will implement a Title IX grievance procedure in which all steps and activities are clearly delineated, responsibilities and timelines are specified, and assistance and information with respect to all Title IX grievance matters are made available to all parties (grievant, respondent and decision-maker). This procedure will be disseminated to all parents, students and employees by September 30, 1989, and annually thereafter. The name, office address and telephone number of the Title IX Coordinator or designated individual(s) responsible for handling Title IX complaints will be included in employee and parent/student handbooks, catalogs, bulletins and other relevant publications annually.

[redacted]

Superintendent
Milwaukee Public Schools or
designee

6/19/89
Date

UNITED STATES DEPARTMENT OF EDUCATION

REGION IV
POST OFFICE BOX 1705
101 MARIETTA TOWER, 27TH FLOOR
ATLANTA, GEORGIA 30301

OFFICE FOR CIVIL RIGHTS

JUN 10 1988

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

[redacted]
President
Rockingham Community College
P.O. Box 38
Wentworth, North Carolina 27375

Dear [redacted]

Re: Compliance Review 04-87-6008

The Office for Civil Rights (OCR) has completed its compliance review of Rockingham Community College's (RCC) vocational and technical programs. The purpose of this review was to assess RCC's compliance with Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. Section 1681 et seq., and its implementing regulation at 34 C.F.R. Part 106, which prohibit discrimination on the basis of sex. RCC is a recipient of Federal financial assistance and is, therefore, subject to the requirements of Title IX.

OCR also used as guidance the Vocational Education Program Guidelines for Eliminating Discrimination and Denial of Services on the Basis of Race, Color, National Origin, Sex, and Handicap at 34 C.F.R. Part 100, Appendix B, which provide guidance regarding the civil rights responsibilities of recipients of Federal financial assistance who administer vocational education programs. Specifically, our review focused on recruitment for specific vocational programs, the counseling of students regarding vocational program selection and admissions criteria for vocational programs.

Our investigation included a review and analysis of records and documents, and interviews with members of your administrative staff, faculty, and students. Based on available information, we have concluded that RCC is in compliance with the Title IX regulation regarding the counseling of students. However, our investigation determined that the RCC is in violation of the Title IX regulation at 34 C.F.R. Sections 106.8(a), 106.9(a),(b)(1) and (2), regarding its notice of nondiscrimination and publications used in connection with the recruitment of students; Section 106.21(c)(4) regarding marital status information requested on its application for admission; and Section 106.37 regarding the administration of a sex-restricted scholarship. The investigation also determined that RCC was in violation of Section 504 of the Rehabilitation Act of 1973 (Section 504) and its implementing regulation at 34 C.F.R. Section 104.8(a) and (b) regarding its notice of nondiscrimination. Subsequent to our investigation, RCC agreed to take the corrective actions necessary to comply with Title IX and Section 504. The factual and legal bases for our determination follows

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Recruitment

The Title IX regulation at 34 C.F.R. Section 106.23 requires a recipient to utilize recruitment activities that do not discriminate on the basis of sex. We found that RCC does have written policies and procedures regarding recruitment. RCC has six staff persons available for counseling and recruitment two of whom are female.

RCC has an on-going recruitment program for students which consists of visits to high schools and participation in career day activities, local business functions and seminars. OCR reviewed numerous brochures and related literature depicting the various program offerings at RCC which are disseminated during recruitment activities.

In reviewing RCC's recruitment brochures and related literature, we found that women and men were depicted in illustrations of various non-traditional program offerings. We also found that generally, the use of sex-linked pronouns is avoided in favor of such terms as "student" or "he/she" in course descriptions and curriculum guides. However, our review also revealed women and men depicted in illustrations relating to traditional program offerings. The Title IX regulation at 34 C.F.R. Section 106.9(b)(2) prohibits a recipient from using or distributing publications which suggest by text or illustration, that such recipient treats applicants, students, or employees differently on the basis of sex.

Interviews conducted with vocational education instructors indicated that they visit local and area high schools in an effort to educate students about the opportunities available in the various trades. While recruitment is an on-going operation at RCC, interviews with staff indicated that recruiting for vocational programs is more successful when instructors have a good relationship with local and area high schools.

We found that the admissions/recruitment office sends out notices of RCC's recruiting schedule to the local news media which provides information on the location and time a recruiting representative will be at a certain location, i.e., Governmental Center, Employment Security Commission, Reidsville Public Library, etc. The RCC representative does not represent any specific vocational or technical program, but rather, the RCC programs in general. Additionally, the RCC recruitment office sends out letters and brochures to schools, organizations and community groups, many of which are all female organizations, asking that RCC representatives be allowed to come and share new and different changes that are taking place at RCC.

Based on the above information, we concluded that RCC's recruitment program operates on a nondiscriminatory basis as required by 34 C.F.R. Section 106.23 of the Title IX regulation. However, we also determined that RCC's recruitment brochures suggest by illustration that students are treated differently on the basis of sex in violation of the Title IX implementing regulation at 34 C.F.R. Section 106.9(b)(2).

Counseling

The Title IX regulation at 34 C.F.R. Section 106.36 requires recipients to ensure that their counseling and use of appraisal and counseling materials do not discriminate on the basis of sex. Moreover, where a recipient finds that a particular class contains a substantially disproportionate number of individuals of one sex, the recipient shall take such action as is necessary to assure itself that such disproportion is not the result of discrimination on the basis of sex in counseling or appraisal materials or by counselors.

We found that counseling services are available to all students and offer the opportunity for each individual to explore with a professional counselor, individual concerns, skills development or choices which may affect them during their college years. The Director of Student Affairs stated that applicants for admission are not directed toward any particular program based on sex. Students interviewed also confirmed that they are not being discriminatorily counseled into vocational programs.

We found that the principal tool used to counsel students toward career goals are the placement tests which are administered to all students. Counselors interviewed indicated that they can measure or reasonably predict a student's prospects for success in a career program based on the placement test results. The placement test, however, does not determine whether a student will have success in a particular program, but shows the student's prospects for succeeding in one program over another. Ultimately, students have the responsibility and opportunity to select their program of study. Staff interviewed acknowledged that there are classes with sexually disproportionate enrollments; however, these classes exist because of student selection. OCR did not find that these classes were disproportionate on the basis of sex due to counselors steering students into programs of study or through the use of discriminatory counseling or appraisal materials. Counselors stated that they have made it a practice to encourage women to consider working in non-traditional jobs.

Based on our review of available information, we concluded that RCC's counseling program is operated on a nondiscriminatory basis as required by 34 C.F.R. Section 106.36 of the Title IX regulation.

Admissions

The Title IX regulation at 34 C.F.R. Section 106.21 requires a recipient to utilize admissions criteria which are nondiscriminatory on the basis of sex.

RCC has an open door admissions policy for persons 18 years of age and over. A high school diploma or the equivalent is normally required for admission to any curriculum program. Some specific admission requirements for vocational and technical programs are as follows:

1. Completed application for admission.
2. Transcript of all previous education beyond the eighth grade.
3. Admission counseling and placement testing (students are tested in areas of English, math, and reading to determine entry level skills).
4. Technical applicants must have a diploma from an accredited high school or have a state approved equivalent education (GED or Adult High School Diploma).

We found that most vocational programs start in the fall; however, a few start in the winter or spring quarter. Students are encouraged to apply as early as possible because RCC accepts students on a first-come basis as determined by the date of the application.

Technical (except for electromechanical and nursing) programs can be started any quarter. The RCC counselors and admission office informs students on what is available for any given quarter. Quarterly schedules are usually available about a month in advance. The Director of Admissions stated that when a vocational course is full, students are placed on a waiting list.

RCC administers a battery of placement tests to each applicant for admission. The stated purpose of RCC's admission placement testing is to provide counselors information regarding the applicant's basic verbal, numerical, mechanical and finger-hand dexterity skills. The Director of Admissions stated that the tests may indicate that students may need remedial help; however, students are still allowed to enroll in the program of choice.

OCR interviewed the Chairperson of the Nursing Department who stated that nursing students are required by the State to take medical and dental examinations. She stated that RCC has not denied admission to any student based on the medical and dental examinations. Further, the Dean of Student Affairs stated that these examinations are not required of students until after they are admitted to the nursing program.

OCR also reviewed RCC's admission application form and attachment. A review of the form and attachment showed that the attachment contained a nondiscriminatory policy statement which did not meet the requirements of the Title IX implementing regulation or Section 504 of the Rehabilitation Act of 1973 (Section 504) and its implementing regulation, as discussed under "Other Violations". Moreover, the application requested information on marital status and also did not contain the notice of nondiscrimination. Pre-admission inquiry as to the marital status of an applicant for admission is prohibited by the Title IX regulation at 34 C.F.R. Section 106.21(c)(4).

We analyzed student enrollment data for RCC for each quarter from summer quarter 1987 to spring 1988 (four quarters) in order to determine whether there were programs that were identifiable on the basis of sex. Vocational and/or technical programs traditionally associated with members of a particular sex were considered identifiable on the basis of sex if the traditionally associated student enrollment deviated by a plus or minus 20 percentage points from the average traditionally associated student population at RCC.

Our analysis of the student enrollment data covering the above four quarter period showed that 1,222 students were enrolled in courses or programs at RCC. Of that total, 777 (64 percent) were female, and 445 (36 percent) were male. Of the 10 technical programs offered, 6 were disproportionately female, while 2 were disproportionately male. Of the 11 vocational program offerings, only 2 were disproportionately female, while 9 were disproportionately male.

Although we found identifiability based on sex in most of RCC's vocational and technical program offerings, these findings alone did not establish programmatic discrimination in RCC's admissions or recruitment procedures. We also reviewed RCC's counseling program to determine whether it was a contributing factor regarding the over and under inclusion of students by sex in the vocational and technical programs. As discussed previously, OCR did not find that disproportionate classes resulted from counseling or through the use of discriminatory counseling or appraisal materials.

Additionally, we requested information from RCC regarding the number of student applicants by sex who were denied admission to vocational and technical programs and the reasons for denial. We were informed by administrative staff that there have been no denials of enrollment in these programs.

Based on our review of RCC's admissions procedures, we determined that RCC has violated 34 C.F.R. Section 106.21(c)(4) of the Title IX regulation because its application for admission includes inquiries regarding marital status. Our conclusions concerning RCC's notice of nondiscrimination are discussed below.

Other Violations

Our review of RCC's 1987-88 catalog showed that RCC has a number of scholarships available for its students. We found, however, one of the scholarships, "J. Cate Scholarship", to be specifically designated for women who enroll in a diploma or postsecondary degree program and have financial need. We, therefore, conclude that RCC is in violation of the Title IX regulation at 34 C.F.R. Section 106.37 which prohibits recipients from administering an award of financial assistance on the basis of availability of funds restricted to members of a particular sex.

The Section 504 regulation at 34 C.F.R. Section 104.8(a) and the Title IX regulation at 34 C.F.R. Section 106.9(a) require that recipient take continuing steps to notify participants, beneficiaries, applicants, and other employees that it does not discriminate on the basis of handicap, or sex respectively.

We found that RCC's nondiscriminatory policy statement, which is included on the application for admission attachment, in the school catalog, and faculty handbook did not meet the requirements of the Title IX and Section 504 regulations. RCC's nondiscriminatory policy statement failed to include that RCC does not discriminate in admission or access to, or treatment or employment in, its programs and activities as required by 34 C.F.R Section 104.8(a) of the Section 504 regulation. Additionally, the nondiscriminatory policy statement failed to provide students and employees with the telephone number of its coordinator and failed to indicate that compliance concerns may be referred to the Assistant Secretary for the Office for Civil Rights, with address, as required by 34 C.F.R. Section 106.9(a) of the Title IX regulation.

Finally, the publications, i.e., brochures, handbooks, etc., used in the recruitment of students did not contain the RCC's notice of nondiscrimination as required by the Title IX regulation at 34 C.F.R. Section 106.9(b)(1) and the Section 504 regulation at 34 C.F.R. Section 104.8(b).

Corrective Action

On May 24, 1988, RCC provided an assurance that the application form for admission will be reprinted to eliminate the inquiry concerning an applicant's marital status. By telephone conversations with RCC officials on June 8, 1988, June 9, 1988, and June 10, 1988, RCC provided the following assurances to ensure that the college is in compliance with the regulatory provisions of Section 504 and Title IX as follows:

1. RCC agrees to expand its affirmative action statement in all institution publications. The following statement will be used in all institution publications:

   > RCC does not discriminate in administering or access to, or treatment or employment or admission in its program and activities. No person shall be discriminated against on the basis of race, sex, religion, age, national origin, or handicap.
   >
   > Inquiries may be directed to the Equal Opportunity/Affirmative Action Officer at the college.
   >
   > The above statement will be inserted in all college publication and when these publications are revised, the statement will be incorporated into the text of the publications.

2. In developing future publications, RCC will attempt to pictorially present both males and females in non-traditional occupations. Presently, the college has on-hand three brochures needing to be changed. This supply should last approximately three to six months at which time the three publications will be revised to pictorially represent both sexes.

3. RCC, in consultation with the donor of the Cate Scholarship, has changed the description of the scholarship to read:

> This scholarship is given by the Cates family and interest derived from the principal sum will be the source of the scholarship. This scholarship will be awarded to any student who enrolls in a diploma or post-secondary degree program and has financial need.

The above statement will be included in the 1989-90 catalog.

4. RCC has included the name of the Assistant Secretary and correct address in the description of its grievance procedures. The statement in the college catalog shall now read:

> Applicants, employees, and students of RCC may lodge grievances involving alleged violations of their rights under the provisions of Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, and Section 504 of the Rehabilitation Act of 1973 with the Equal Opportunity/Affirmative Action Officer at (919) 343-4261 or the Assistant Secretary, Office for Civil Rights, 330 C. Street S.W., Washington D.C. 20202.

The above statement will be included in the 1989-90 catalog.

On June 10, 1988, [redacted] indicated by telephone that you approved the above stated assurances. If there are any questions with regard to the language of the assurances as stated above, RCC should notify this office within ten days of the date of this letter.

On the basis of these assurances, we believe that RCC has compiled with the requirements of the regulation implementing Title IX of the Education Amendments of 1972 at 34 C.F.R. Sections 106.8(a), 106.9(a),(b)(1) and (2), regarding its notice of nondiscrimination and publications used in connection with the recruitment of students; 106.21(c)(4) regarding marital status information requested on its application for admission; and 106.37 regarding the administration of a sex restricted scholarship. The recipient's assurances will also correct the violations of the Section 504 regulation at 34 C.F.R. Section 104.8(a) and (b) regarding its notice of nondiscrimination. Based upon the corrective action taken by RCC, we are closing this compliance review as of the date of this letter. Continued compliance is contingent upon carrying out the provisions of the corrective actions. Failure to perform the actions in question may result in a finding of a violation.

Monitoring Requirements

- A copy of the revised admissions application form should be submitted to OCR by September 30, 1988.

- Copies of pictorial publications showing both male and female students in non-traditional occupations should be submitted to OCR by January 15, 1989.

- Copies of the revised nondiscriminatory policy statement and grievance procedures for the 1989-90 catalog should be submitted to OCR by September 30, 1989.

- Evidence that RCC has changed the description of the Cates Scholarship to include "any student," rather than be restricted to female students only should be submitted to OCR by September 30, 1989.

- A copy of the 1989-90 catalog should be submitted to OCR by September 30, 1989.

This letter of findings is not intended, nor should it be construed, to cover any other issues regarding compliance with Title IX and Section 504 that may exist and which are not discussed herein.

You are reminded that an institution may not harass or intimidate an individual who has participated in our investigation. If this happens, persons have the right to file a complaint with OCR alleging such harassment or intimidation.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. In the event that OCR receives such a request, we will seek to protect, to the extent provided by law, personal information which, if released, would constitute an unwarranted invasion of privacy.

We appreciate the cooperation and assistance of your staff during the investigation. If you have any questions, please contact Mr. William M. Meredith, Director, Elementary and Secondary Education Division #1, at (404) 331-2968.

Sincerely,

for Jesse L. High
Regional Civil Rights Director

cc:
Chief State School Officer

Ref. No: 03856009

JUN 25 1985

[redacted]
President
University of Maryland
College Park, Maryland 20742

Dear Dr. [redacted]:

The Office for Civil Rights (OCR) has completed its review of the University of Maryland Eastern Shore's (UMES) undergraduate programs under Title IX of the Education Amendments of 1972 and the U.S. Department of Education's (ED) implementing regulations found at 34 C.F.R. Part 106. We examined the University's recruitment, admissions and financial aid policies, procedures and practices to determine whether they discriminate on the basis of sex. See 34 C.F.R. Sections 106.21-23 and 106.37.

UMES receives Federal financial assistance through ED programs and is therefore subject to the provisions of Title IX of the Education Amendments of 1972 and ED's implementing regulations (found at 34 C.F.R. Part 106) and may not discriminate in its provision of benefits or services on the basis of sex. See 34 C.F.R. Part 106.

As you were informed in our letter to you dated December 31, 1984, the review was conducted in two phases. The first phase involved a desk audit of the data you submitted to us regarding the University's undergraduate programs. The second phase consisted of on-site interviews with University administrators and staff on June 19 and 20, 1985 and a review of student files.

As a result of our investigation, we found that UMES is in compliance with Title IX with respect to recruitment and financial aid. However, we found that the University is not in compliance with the Title IX regulation with regard to an admissions inquiry on the student application form pertaining to an applicant's marital status. See 34 C.F.R. 106.21.

In addition, while reviewing material submitted by the University, a question was found on the University's application for admission form asking about the physical disability of an applicant. Under Section 504 of the Rehabilitation Act of 1973 and ED's implementing regulation found at 34 C.F.R. Section 104.42(b)(4), a University may not make preadmission inquiries as to an applicant's disability [except where the institution is taking affirmative steps to overcome effects of past limited participation by handicapped persons. See 34 C.F.R. Section 104.42(c)(1) and (2)]. Therefore, the University is in violation of this regulation. The application form and a separate UMES data sheet submitted with it include an inquiry as to the applicant's racial/ethnic background without an appropriate explanatory note on the form concerning this inquiry.

Through discussions between Ms. Catherine Edwards, Regional Civil Rights Attorney with OCR, and Ms. Andrea Hill, Assistant Attorney General for the State of Maryland, which were held on May 15, and May 29, 1986, the University of Maryland has voluntarily agreed to remedy the violations. By letter dated June 7, 1986, the University has agreed to delete entirely or to reword questions that made a preadmission inquiry regarding marital status, to delete the questions making a preadmission inquiry regarding handicap, and to place a disclaimer on the application form and the data sheet to address race, ethnicity and sex inquiries. A copy of the agreement is enclosed. In light of these actions, we find UMES in compliance with regard to these issues.

Continued compliance is contingent upon UMES's carrying out the provisions of the agreement. Failure to perform the actions in question may result in the finding of a violation. As is our standard practice, implementation of the agreement will be monitored. The University of Maryland should forward to OCR a copy of the revised application and UMES data sheet by August 31, 1986.

The following is a summary of our findings and conclusions reached as a result of our review.

RECRUITMENT

Title IX and ED's implementing regulations require that a recipient's activities be conducted in a nondiscriminatory manner so that potential applicants for admission are informed of the University's education programs without regard to sex. ED's implementing regulation provides at 34 C.F.R. Section 106.23(a), in part:

> A recipient to which this subpart applies shall not discriminate on the basis of sex in the recruitment and admission of students.

We found that as a part of the University of Maryland (UM) system, UMES's primary recruitment area is the state of Maryland. The recruitment effort is focused primarily on Maryland schools and community colleges as there is a limit on the percentage of non-Maryland residents that can enroll at any of the UM campuses. Appropriately, UMES participates in the UM recruitment effort, with other campuses of the system, which results in all of Maryland's community colleges being visited by UM personnel.

However, other states are visited. For the most part, these visits are to areas which UMES alumni suggest or recommend. Located in the Delmarva Peninsula, UMES recruits in Delaware and Virginia. Because of the large numbers of alumni, New Jersey, Pennsylvania and the District of Columbia are also visited.

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The recruitment staff consists of three recruiters, two of whom are female. The Assistant Director of Admissions also has recruiting responsibilities, including recruitment of merit scholars from all of Maryland's community colleges. The Vice Chancellor for Student Affairs heads the recruitment office among his other duties.

Most of UMES's recruiting is done through participation in college fairs. College fairs are open to all schools in the area in which they are held. UMES participates in fairs in New Jersey, Pennsylvania, Delaware and the District of Columbia. In each of these areas there are strong UMES alumni chapters. One of the largest chapters is located in Philadelphia. Personal contacts are made at the college fairs. From information gathered at the college fairs, UMES recruitment staff mail personal letters to specific students, i.e., those who appear on merit/scholar lists. In addition, UMES recruiters visit certain schools when requested by school counselors. Each recruiter has a specific area to cover.

High school careers days are not held on the UMES campus. Telephone calls are essentially follow-ups to visits and are only for the purpose of determining continued interest in UMES as well as to request information to complete the applicant's file.

As noted earlier, UMES's primary recruitment area is the state of Maryland. Statistics from the Maryland State Department of Education reveal that as of September 30, 1984, the percentage of females in public school grades 10 through 12 was 50.3 percent, or 79,624 females in the total population of 158,286 public school students. Statistics from the 1984 edition of The Handbook of Private Schools, a privately published directory, reveal a 50/50 sexual split for the private high school students in the state of Maryland: 5,105 males and 5,105 females. Calculations made from 1980 census data for ages 11-14, aged 15-18 in 1984, showed proportions of 50.9 percent male and 49.1 percent female.

From these sources we derived percentages for comparison purposes of 50 percent male and 50 percent female in UMES's high school recruitment pool.

UMES also recruits from Maryland's community college system. The latest figures available to OCR (1980 HEGIS Report) show that women comprised 59.31 percent (60,260 out of 101,603) of the students at community colleges in that state. These figures follow in table form:

Recruitment Source	Total	Male	% Male	Female	% Female
Maryland Public High School (10-12) Population (1984)	158,286	78,662	49.7	79,624	50.3
Maryland Private High School Population (1984)	10,210	5,105	50.00	5105	50.0
Maryland Community Colleges (1984)	99,584	40,376	40.54	59,208	[illegible]

Of a secondary nature is UMES's recruitment at high schools in other states. For identified schools for which we could gather statistics, we find the following:

State	Total	Male	% Male	Female	% Female
Delaware	3566	1661	46.58	1905	53.42
D.C.	2838	1261	44.43	1557	55.57
Virginia	13,554	6453	47.61	7101	52.39
Total	19,958	9375	46.97	1,0583	53.03

The regulation dealing with recruitment, which is found at 34 C.F.R Section 106.23, states that a recipient shall not discriminate on the basis of sex in recruitment nor recruit primarily or exclusively at institutions that admit only or predominately one sex, if that has the effect of discriminating on the basis of sex.

As noted earlier, UMES's primary recruitment area is the state of Maryland. As part of the University of Maryland system, in conjunction with the other campuses, UMES recruits at all or most schools in the state, along with Delaware and Virginia schools in the Delmarva Peninsula. Overall, these schools have a female population of slightly over 50 percent.

Although UMES does recruit at some single-sex or predominantly one sex institutions, we found such schools for both males and females. UMES does not recruit primarily or exclusively at single-sex institutions. Therefore, UMES does not discriminate in its recruitment policies on the basis of sex.

ADMISSIONS

As with recruitment, the focus of UMES's admissions policy is on Maryland residents. For Maryland residents, there are two types of freshman admissions, preferred and regular. The requirements for admission under these categories are described on page 18 of the UMES catalogue:

Preferred Admissions

All Maryland high school students with a combined SAT score of 1,000 and a B average (3.0 on a 4.0 scale) in academic subjects in grades 9 through 11 will be guaranteed admission to the University. In addition, all Maryland students who meet or exceed the following requirements for a combined SAT score and grade point average will also be guaranteed admission.

Total SAT	Academic GPA	Total SAT	Academic GPA
800	3.36 to 4.00	900	3.17
810	3.34	910	3.15
820	3.32	920	3.13
830	3.30	930	3.10
840	3.28	940	3.09

Total SAT	Academic GPA	Total SAT	Academic GPA
850	3.26	950	3.07
860	3.24	960	3.05
870	3.22	970	3.03
880	3.20	980 to 1600	3.00
890	3.19		

Regular Admission

Maryland residents will be eligible for admission, on a space-available basis, if they meet the following requirements for a combined SAT score and academic grade point average in grade 9 through 11:

Total SAT	Academic GPA	Total SAT	Academic GPA
650	2.75 to 4.0	850	2.35
660	2.73	860	2.34
670	2.71	870	2.32
680	2.69	880	2.30
690	2.67	890	2.28
700	2.65	900	2.26
710	2.63	910	2.24
720	2.61	920	2.22
730	2.59	930	2.20
740	2.57	940	2.18
750	2.55	950	2.16
760	2.53	960	2.14
770	2.51	970	2.12
780	2.49	980	2.10
790	2.47	990	2.08
800	2.45	1000	2.06
810	2.43	1010	2.04
820	2.41	1020	2.02
830	2.39	1030 to 1060	2.00
840	2.37		

The Grade Point Average is to include the following requirements:

- four years of English
- three years of history or social science
- two years of science
- two years of mathematics, one of which must be taken at the Algebra I level.

(Additionally for fall, 1985 one of the science courses will include laboratory work.)

If after the preferred and regular admissions of Maryland residents, space remains, the applications of out-of-state students will be considered. Because the primary obligation of UMES is to Maryland residents, admission for out-of-state students is competitive.

The interviews with UMES personnel involved with admissions confirmed this information for the most part. The Assistant Director of Admissions stated that the lowest combination with which a student will be admitted on the regular basis is a 2.0 GPA with an 830 SAT. This differs from the lowest combination stated in the catalogue but is the guide used by the Assistant Director of Admissions for admissions decisions. However, there is a special admissions program for students with less than that combination. The lowest combination allowed under this program is a 1.75 GPA with a 650 SAT.

The admissions process begins with a student's submission of an application form and a $20.00 non-refundable application fee. Complete applications are accepted until the last day of registration, depending on the availability of space. Applications are accepted from students upon completion of their high school junior year.

Transfer students may also apply for admission. They must have a GPA of at least 2.0 in previous college work, an A.A degree, or 56 hours at a community college.

The admissions office consists of the Assistant Director of Admissions, the Assistant Registrar and three clericals. All except one of the clericals are female. The Assistant Director of Admissions reviews all of the applications and makes the decisions on admissions by herself.

The statistics for the academic years 1982-1984 reveal that females constitute a higher percentage of accepted students than males:

ACCEPTANCES BY SEX 1982-1984

Academic Year	Total	Males	% Males	Female	% Females
1982	810	393	48.52	417	51.48
1983	814	393	48.28	421	51.72
1984	892	420	47.09	472	52.91
1982-1984	2516	1206	47.93	1310	52.07

This chart shows not only that women consistently have been a higher percentage of acceptances than men but that the percentage has increased each year.

The statistics submitted to OCR also reveal that a higher percentage of females who applied were accepted in comparison to males:

PERCENTAGE ACCEPTED BY SEX

	Males			Females		
Academic Year	Applied	Accepted	% Accepted	Applied	Accepted	% Accepted
1982	574	393	68.47	582	417	[illegible]
1983	583	393	67.41	593	421	[illegible]
1984	588	420	71.43	610	472	[illegible]
1982-1984	1745	1206	69.11	1785	1310	[illegible]

The Application Form

As part of the procedure for conducting a compliance review, OCR reviews the institution's application form for admission. We found areas of concern on this application form. (This form is also used by the UM Baltimore County and College Park campuses.)

The application form and UMES's Registration Data Processing Information Sheet, which accompanies the application form, request race/ethnic origin and sex without a disclaimer. A disclaimer does appear on page 2 of the application booklet. However, the disclaimer should appear on the application form itself.

A sample disclaimer for the inquiry as to racial/ethnic background is as follows:

> This information is requested solely for the purpose of determining compliance with Federal civil rights law, and your response will not affect consideration of your application. As part of the state of Maryland's Plan to Ensure Equal Postsecondary Educational Opportunity: 1985-1990, the University of Maryland is required to collect this information. By providing this information, you will assist us in assuring that this program is administered in a nondiscriminatory manner.

Regarding the inquiries as to marital status found on the application form at question 21 and block 4 of question 27 ("Spouse of 100 percent disabled veteran"), the regulation implementing Title IX of the Education Amendments at 34 C.F.R. Section 106.21(c)(4), states that a recipient:

> Shall not make preadmission inquiry as to the marital status of an application for admission, including whether such applicant is "Miss" or "Mrs."

However, an institution may solicit this information on a voluntary basis if the institution states clearly on its application form: (1) the individual is not required to provide this information; (2) the information will not be used as a factor in the admissions process, and (3) the use to which the institution will put the information.

Question #28 on the application form requests information relating to handicap. It reads: "The following information will be used to assist us in understanding your needs. It will not be used to determine eligibility for admission, nor does it guarantee availability of services If you are disabled, please check the appropriate category." This violates the regulations implementing Section 504 of the Rehabilitation Act of 1973. The Section 504 regulation at 34 C.F.R. Section 104.42(b)(4) states:

> "[a recipient] may not make pre-admission inquiry as to whether an applicant for admission is a handicapped person but, after admission, may make inquiries on a confidential basis as to handicaps that may require accommodation."

The regulation also applies to Question #27 Block 9. Preadmission knowledge as to whether an applicant is a recipient of Vocational Rehabilitation benefits is an inquiry as to handicap.

The regulation dealing with admissions under Title IX is found at 34 C.F.R. Section 106.21, prohibits preference, numerical limitation and differential treatment based on sex. In our review, we did not find any type of preference given to either sex, any numerical limitations placed on either sex or any type of differential treatment. Admission to UMES is based solely on the combined SAT/GPA scores for freshmen and other objective criteria for transfers.

The statistical information reveals that women comprise slightly over [illegible] percent of those students admitted, which reflects the availability in the recruitment pool. The difference between the percentage of men accepted who applied and the percentage of women accepted who applied is not significant.

FINANCIAL AID

UMES offers both need based aid and merit based aid. The University defines financial aid as Federal need based aid (grants, loans and college work study (CWS)) and scholarships as merit based aid. Merit based aid is awarded by the individual departments. The Financial Aid Office handles only need based aid, although some also has a merit requirement.

There are certain steps to be followed in applying for financial aid. The application for financial aid consists of:

1. University of Maryland Eastern Shore Application for Financial Aid.
2. Financial Aid Form (FAF) or the Family Financial Statement (FFS).
3. Pell Grant Student Aid Report.

UMES requests that all three forms be received in the Financial Aid Office by April 1st.

Prior to the 1985-1986 academic year, there was no minimum need level, so funding was guaranteed for those who submitted their application by April 1. Beginning this year, the minimum level of need to be funded is $1000. If forms are received after that date, funds not yet expended will be distributed on a "first-come, first-served" basis. Award notices are mailed out around May 15th with those for returning students being mailed first.

The Financial Aid Office consists of the Director and three permanent and two temporary clericals and two student workers. All of its staff but the Director are female.

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The Director of Financial Aid reviews all of the applications and makes all of the awards except for the Pell grants, which are done by a clerical. Funding in terms of grants and CWS is awarded as equally as possible among the applicants. Out-of-state students receive a combined amount of $3000.00, while Maryland residents get between $1800 and $2000 in a combination of grants and CWS. It has been the Director's experience that women in general tend to be more prompt than men in submitting their applications. This is reflected in the HEGIS Report, which shows that women receive the majority of the financial aid.

The financial aid office handles only one need based award that is based solely on sex, the Charlotte Newcomb Scholarships. This scholarship is offered by all UM campuses. UMES offers approximately eight awards a year To be eligible, a woman must be at least 25 years old and at least half way through her undergraduate work. This is the only single sex award made

The Director stated that UMES provides awards based on merit, but they are not awarded by the financial aid office. They are departmental awards. All of these awards are scholarships. No fellowships or assistantships are awarded on the undergraduate level.

At UMES, the term "financial aid" is defined as Federal financial aid. Therefore, "financial aid" is solely need based aid and controlled through UMES's Financial Aid Office. In the discussion that follows, references to "financial aid" refers to need-based aid. Merit based aid, or departmental scholarships, will be discussed following the discussion of "financial aid."

The Director stated that about 40 percent of the entire student body receives financial aid. Approximately 90 percent of these receive $2,000.00 or more. If a student has a need of more than $1,000.00, aid is provided from grants. If the need is more than 2,000.00, aid is provided through two grants and a job (CWS). There are four types of non-loan aid controlled by the University:

1. University Grant
2. SEOG
3. Grant-in-Aid (for other-race students)
4. College Work Study (CWS)

CWS awards are generally either $800.00 or 1,000.00 depending whether the student is a Maryland resident or from another state. There is also a small amount of NDSL money available. For the 1984-1985, it amounted to only $19,000.

The statistics submitted by the Director reveal that females are not discriminated against in the numbers receiving financial aid. In a letter dated April 30, 1985, the Director sent us financial aid figures for academic years 1982-1983 and 1983-1984. These figures are shown in the following charts:

ACADEMIC YEAR 1982-1983

Type of Student	# of Students Receiving Financial Aid	# of Students Not Receiving Financial Aid	Total Enrollment
Males	401	149	550
Females	488	112	600
Total	889	261	1150

This chart shows that for academic year 1982-1983 although females numbered 600 or 52.17 percent of the total enrollment, they numbered 488 or 54.89 percent of all students receiving financial aid.

ACADEMIC YEAR 1983-1984

Type of Student	# of Students Receiving Financial Aid	# of Students Not Receiving Financial Aid	Total Enrollment
Males	391	146	537
Females	510	113	623
Total	901	259	1160

This chart shows that for academic year 1983-1984, although females numbered 623 or 53.71 percent of the total enrollment, they numbered 510 or 56.60 percent of all students receiving financial aid.

UMES also provided the average amount of need, average award (not including Pell Grants or Guaranteed Student Loans) and the average amount of unmet need for two years:

AVERAGE NEED/AWARD/UNMET NEED

1982-1983

	Males	Females
Number of Awards	132	202
Average Need	$3,852	$4,152
Average Award	$2,176	$2,191
Average Unmet Need	$1,676	$1,961

1983-1984

	Males	Females
Number of Awards	122	234
Average Need	$4,328	$4,629
Average Award	$2,345	$2,663
Average Unmet Need	$1,983	$1,967

This table reveals that in both 1982-1983 and 1983-1984, females in the group reported had a greater average amount of need then males and received a larger average award. Although in the 1982-1983 academic year the females' average unmet need was higher then that for males, in 1983-1984 the average unmet need for females was smaller than males.

We were unable to draw any definitive conclusions from this data, however, because the figures provided did not include Pell grants or guaranteed student loans.

As noted earlier, the Financial Aid Office does not handle scholarships ("Honor Awards"). These are handled by departments. However, the Director of Financial Aid was able to gather some information for this review. In 1982-1983 males received 28 scholarships with the awards averaging $1,576.46; while females received 30 scholarships averaging out to $1,530.53. For 1984-1985, the figures for males were 34/$1,601.41 and for females 44/$1,502.77. None of these departmental scholarships had any criteria based on sex.

The difference for both years, 1982-1983 and 1984-1985, was less than $100.00 in the average amount. More females than males received departmental scholarships.

In this analysis of financial aid (both need based and merit based), we did not find that UMES limits eligibility, or applies different criteria on the basis of sex with one exception, the Charlotte Newcomb Scholarships for females. That scholarship is offered by all University of Maryland campuses. We were unable to determine on the evidence provided whether UMES discriminates on the basis of sex in the amount of need met by financial aid or the types of aid because our data was incomplete.

CONCLUSIONS

Recruitment

We found the policies and procedures employed, in UMES's recruitment program, to be nondiscriminatory on their face. It proved to be so upon examination of the relevant information. The latest figures we have from the state of Maryland show that the state's high school (both public and private) population is slightly more than 50 percent female, and its community college population is 59.46 percent female. (UMES was unable to inform us how many of its applicants were from community colleges.) In comparison, females comprised 50.57 percent of the total number of applicants (from both high schools and community colleges) to UMES over the three years examined, 1982-1984. (Individually, each year's percentage of female applicants was over 50 percent.)

Therefore, we find that UMES is complying with 34 C.F.R. Section 106.23

Admissions

We found the policies and procedures employed in UMES's admission decisions to be nondiscriminatory. Females comprised 52.07 percent of all the students accepted over the three years under review, 1982-1984. (Individually, each year's percentage of female acceptances was greater than 51 percent.) Further, for each of the three years under review, [illegible] percentage of acceptances who were female was similar to the percentage of applicants who were female. Therefore, UMES is in compliance with 34 C.F.R. Section 106.21(a) and (b).

The Application Form

As previously stated, UMES has taken the necessary actions to correct the violations identified above.

Financial Aid

We found the policies and procedures employed in UMES's distribution of financial aid to be non-discriminatory on their face. The figures show that for the two academic years for which statistics were provided, 1982-1983 and 1983-1984, a larger percentage of females received need-based financial aid than their percentage of the student body. The average size of their need-based award in the categories for which information was provided was larger than that for males for both academic years, but their average need was also greater. Females received a larger number of departmental scholarships, although the average scholarship was smaller. However, the difference in both years examined was less than $100.00 in each year. In addition, the existence and award of the single sex scholarship for females did not make a significant impact on the overall financial awards available to men. We were unable to determine whether UMES discriminated on the basis of amounts awarded because our data was incomplete, and we were also unable to determine whether there was any difference based on sex, in portions of aid given as grants, rather than loans or work study funds. Therefore, we find UMES to be in compliance with 34 C.F.R. Section 106.37.

This Letter of Findings is not intended nor should it be construed to cover any issues regarding the University's compliance with Title IX and Section 504 that may exist and are not discussed herein.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. In the event that OCR receives such a request, we will protect, to the extent provided by law, personal information which, if released, would constitute an unwarranted invasion of privacy.

We would like to extend to you and your staff our sincere appreciation for the cooperation and courtesy given to us during our review of your institution. If you have any questions, please contact Mr. Robert E. Harvey, Director, Postsecondary Education Division at (215) 596-6804.

Sincerely,

Jeanette J. Lim, Acting Director
Office for Civil Rights
Region III

Enclosure

cc: [redacted], Chancellor
University of Maryland Eastern Shore

[redacted], Esquire
Assistant Attorney General

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UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF THE ASSISTANT SECRETARY FOR CIVIL RIGHTS

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OCT 17 1984

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[redacted]
Scholarship Chairman
Democratic Women's Club of Florida, Inc.
60 North Tropical Way
Merritt Island, Florida 32952

Dear [redacted]

Your letter to President Reagan regarding my earlier letter to you on the Democratic Women's Club of Florida, Inc.'s scholarship for women has been referred to this Office for reply. You indicate that the Department of Justice (DOJ), in an interim response to your earlier inquiry, seemed to offer a positive view of your proposal to solicit the assistance of high schools and colleges throughout Florida in announcing the availability of a single-sex scholarship and in providing application forms to qualified students.

As DOJ correctly stated in its response to you, it is the Office for Civil Rights of the Department of Education (OCR) which is charged with interpreting and enforcing Title IX and its regulation as they relate to programs and activities receiving Federal financial assistance from this Department. I do not think the DOJ letter should be read as offering a "positive view" of your proposal. What the Assistant Attorney General for Civil Rights was attempting to communicate was the point that in view of OCR's responsibility for interpreting and enforcing Title IX, a positive reading of your proposal by OCR, should it be forthcoming, could be used to calm wary school administrators.

However, OCR has carefully reviewed Title IX, and reached the conclusion that under that regulation there is no way to permit recipient educational agencies and institutions to publicize this single-sex scholarship or otherwise assist in the administration of it.

I recognize that by awarding a scholarship for women, the Democratic Women's Club of Florida, Inc. is attempting to assist women, not harm them. Apparently, that was also the motivation of Congress when it enacted Title IX of the Education Amendments of 1972. Recognizing a history of discrimination against women in education, and particularly in admissions,

Page 2 - [redacted]

financial aid and athletics, Congress chose to require that recipient educational agencies and institutions treat both sexes equally instead of favoring one over the other. OCR must enforce the law consistent with Congress' intent.

Sincerely,

Harry M. Singleton
Assistant Secretary
for Civil Rights

cc: Honorable William Bradford Reynolds

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF THE ASSISTANT SECRETARY FOR CIVIL RIGHTS

AUG [illegible] 1984

The Honorable Lawton Chiles
United States Senator
Federal Building
Lakeland, Florida 33801

Dear Senator Chiles:

This is in further response to your letter on behalf of
and the Democratic Women's Club of Florida, Inc. Scholarship (DWCF). [illegible]
[redacted] is concerned that many school administrators are afraid
to publicize the DWCF's scholarship program for females because it would
jeopardize their compliance with Title IX of the Education Amendments of
1972.

Title IX is designed to eliminate discrimination on the basis of sex in any education program or activity receiving Federal financial assistance. OCR is charged with enforcing Title IX, but it has no authority over the activities of private noneducational organizations except as their activities affect educational programs and activities that receive Feder financial assistance. However, as to recipient educational agencies and institutions, the Title IX regulation is quite specific. The regulation implementing Title IX at 34 C.F.R. § 106.37 states:

> (a) . . . in providing financial assistance to any of its students, a recipient shall not . . . (2) through solicitation, listing, approval, provision of facilities or other services, assist any foundation, trust, agency, organization or person which provides assistance to any of such recipient's students in a manner which discriminates on the basis of sex;

The language of the regulation clearly prohibits recipient educational programs and activities from posting or listing the announcement or the otherwise assisting in the administration of this single-sex scholarsh

400 MARYLAND AVE., S.W. WASHINGTON, D.C. 20202

The DWCF is free to continue to offer such a scholarship, but recipient educational programs and activities may not serve as conduits for the announcement and application process for such a scholarship. I have also responded to [redacted] directly on this matter.

Sincerely,

Harry M. Singleton
Assistant Secretary
for Civil Rights

federal register

Friday
May 9, 1980

Part II

Department of Education

Establishment of Title 34

TITLE IX
EDUCATION AMENDMENTS OF 1972

PART 106—NONDISCRIMINATION ON THE BASIS OF SEX IN EDUCATION PROGRAMS AND ACTIVITIES RECEIVING OR BENEFITING FROM FEDERAL FINANCIAL ASSISTANCE

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Subject Index to Title IX Preamble and Regulation

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Subpart A—Introduction

§ 106.1 Purpose and effective date.

The purpose of this part is to effectuate title IX of the Education Amendments of 1972, as amended by Pub. L. 93-568, 88 Stat. 1855 (except sections 904 and 906 of those Amendments) which is designed to eliminate (with certain exceptions) discrimination on the basis of sex in any education program or activity receiving Federal financial assistance, whether or not such program or activity is offered or sponsored by an educational institution as defined in this part. This part is also intended to effectuate section 844 of the Education Amendments of 1974, Pub. L. 93-380, 88 Stat. 484. The effective date of this part shall be July 21, 1975.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682, as amended by Pub. L. 93-568, 88 Stat. 1855, and Sec. 844, Education Amendments of 1974, 88 Stat. 484, Pub. L. 93-380)

§ 106.2 Definitions.

As used in this part, the term—

(a) *"Title IX"* means title IX of the Education Amendments of 1972, Pub. L. 92-318, as amended by section 3 of Pub. L. 93-568, 88 Stat. 1855, except sections 904 and 906 thereof; 20 U.S.C. 1681, 1682, 1683, 1685, 1686.

(b) *"Department"* means the Department of Health, Education, and Welfare.

(c) *"Secretary"* means the Secretary of Education.

(d) *"Assistant Secretary"* means the Assistant Secretary for Civil Rights of the Department.

(e) *"Reviewing Authority"* means that component of the Department delegated authority by the Secretary to appoint, and to review the decisions of, administrative law judges in cases arising under this part.

(f) *"Administrative law judge"* means a person appointed by the reviewing authority to preside over a hearing held under this part.

(g) *"Federal financial assistance"* means any of the following, when authorized or extended under a law administered by the Department:

(1) A grant or loan of Federal financial assistance, including funds made available for:

(i) The acquisition, construction, renovation, restoration, or repair of a building or facility or any portion thereof; and

(ii) Scholarships, loans, grants, wages or other funds extended to any entity for payment to or on behalf of students admitted to that entity, or extended directly to such students for payment to that entity.

(2) A grant of Federal real or personal property or any interest therein, including surplus property, and the proceeds of the sale or transfer of such property, if the Federal share of the fair market value of the property is not, upon such sale or transfer, properly accounted for to the Federal Government.

(3) Provision of the services of Federal personnel.

(4) Sale or lease of Federal property or any interest therein at nominal consideration, or at consideration reduced for the purpose of assisting the recipient or in recognition of public interest to be served thereby, or permission to use Federal property or any interest therein without consideration.

(5) Any other contract, agreement, or arrangement which has as one of its purposes the provision of assistance to any education program or activity, except a contract of insurance or guaranty.

(h) *"Recipient"* means any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, any public or private agency, institution, or organization, or other entity, or any person, to whom Federal financial assistance is extended directly or through another recipient and which operates an education program or activity which receives or benefits from such assistance, including any subunit, successor, assignee, or transferee thereof.

(i) *"Applicant"* means one who submits an application, request, or plan required to be approved by a Department official, or by a recipient, as a condition to becoming a recipient.

(j) *"Educational institution"* means a local educational agency (L.E.A.) as defined by section 801(f) of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 881), a preschool, a private elementary or secondary school, or an applicant or recipient of the type defined by paragraph (k), (l), (m), or (n) of this section.

(k) *"Institution of graduate higher education"* means an institution which:

(1) Offers academic study beyond the bachelor of arts or bachelor of science degree, whether or not leading to a certificate of any higher degree in the liberal arts and sciences; or

(2) Awards any degree in a professional field beyond the first professional degree (regardless of whether the first professional degree in such field is awarded by an institution of undergraduate higher education or professional education); or

(3) Awards no degree and offers no further academic study, but operates ordinarily for the purpose of facilitating research by persons who have received the highest graduate degree in any field of study.

(l) *"Institution of undergraduate higher education"* means:

(1) An institution offering at least two but less than four years of college level study beyond the high school level, leading to a diploma or an associate degree, or wholly or principally creditable toward a baccalaureate degree; or

(2) An institution offering academic study leading to a baccalaureate degree; or

(3) An agency or body which certifies credentials or offers degrees, but which may or may not offer academic study.

(m) *"Institution of professional education"* means an institution (except any institution of undergraduate higher education) which offers a program of academic study that leads to a first professional degree in a field for which there is a national specialized accrediting agency recognized by the Secretary.

(n) *"Institution of vocational education"* means a school or institution (except an institution of professional or graduate or undergraduate higher education) which has as its primary purpose preparation of students to pursue a technical, skilled, or semiskilled occupation or trade, or to pursue study in a technical field, whether or not the school or institution offers certificates, diplomas, or degrees and whether or not it offers full-time study.

(o) *"Administratively separate unit"* means a school, department or college of an educational institution (other than a local educational agency) admission to which is independent of admission to any other component of such institution.

(p) *"Admission"* means selection for part-time, full-time, special, associate, transfer, exchange, or any other enrollment, membership, or matriculation in or at an education program or activity operated by a recipient.

(q) *"Student"* means a person who has gained admission.

(r) *"Transition plan"* means a plan subject to the approval of the Secretary pursuant to section 901(a)(2) of the Education Amendments of 1972, under

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which an educational institution operates in making the transition from being an educational institution which admits only students of one sex to being one which admits students of both sexes without discrimination.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 106.3 Remedial and affirmative action and self-evaluation.

(a) *Remedial action.* If the Assistant Secretary finds that a recipient has discriminated against persons on the basis of sex in an education program or activity, such recipient shall take such remedial action as the Assistant Secretary deems necessary to overcome the effects of such discrimination.

(b) *Affirmative action.* In the absence of a finding of discrimination on the basis of sex in an education program or activity, a recipient may take affirmative action to overcome the effects of conditions which resulted in limited participation therein by persons of a particular sex. Nothing herein shall be interpreted to alter any affirmative action obligations which a recipient may have under Executive Order 11246.

(c) *Self-evaluation.* Each recipient education institution shall, within one year of the effective date of this part:

(1) Evaluate, in terms of the requirements of this part, its current policies and practices and the effects thereof concerning admission of students, treatment of students, and employment of both academic and non-academic personnel working in connection with the recipient's education program or activity;

(2) Modify any of these policies and practices which do not or may not meet the requirements of this part; and

(3) Take appropriate remedial steps to eliminate the effects of any discrimination which resulted or may have resulted from adherence to these policies and practices.

(d) *Availability of self-evaluation and related materials.* Recipients shall maintain on file for at least three years following completion of the evaluation required under paragraph (c) of this section, and shall provide to the Assistant Secretary upon request, a description of any modifications made pursuant to paragraph (c) (ii) of this section and of any remedial steps taken pursuant to paragraph (c) (iii) of this section.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

(40 FR 24128, June 4, 1975; 40 FR 39506, Aug. 28, 1975)

§ 106.4 Assurance required.

(a) *General.* Every application for Federal financial assistance for any education program or activity shall as condition of its approval contain or be accompanied by an assurance from the applicant or recipient, satisfactory to the Assistant Secretary, that each education program or activity operated by the applicant or recipient and to which this part applies will be operated in compliance with this part. An assurance of compliance with this part shall not be satisfactory to the Assistant Secretary if the applicant or recipient to whom such assurance applies fails to commit itself to take whatever remedial action is necessary in accordance with § 86.3(a) to eliminate existing discrimination on the basis of sex or to eliminate the effects of past discrimination whether occurring prior or subsequent to the submission to the Assistant Secretary of such assurance.

(b) *Duration of obligation.* (1) In the case of Federal financial assistance extended to provide real property or structures thereon, such assurance shall obligate the recipient or, in the case of a subsequent transfer, the transferee, for the period during which the real property or structures are used to provide an education program or activity.

(2) In the case of Federal financial assistance extended to provide personal property, such assurance shall obligate the recipient for the period during which it retains ownership or possession of the property.

(3) In all other cases such assurance shall obligate the recipient for the period during which Federal financial assistance is extended.

(c) *Form.* The Director will specify the form of the assurances required by paragraph (a) of this section and the extent to which such assurances will be required of the applicant's or recipient's subgrantees, contractors, subcontractors, transferees, or successors in interest.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 106.5 Transfers of property.

If a recipient sells or otherwise transfers property financed in whole or in part with Federal financial assistance to a transferee which operates any education program or activity, and the Federal share of the fair market value of the property is not upon such sale or transfer properly accounted for to the Federal Government both the transferor and the transferee shall be deemed to be recipients, subject to the provisions of Subpart B of this part.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 106.6 Effect of other requirements.

(a) *Effect of other Federal provisions.* The obligations imposed by this part are independent of, and do not alter, obligations not to discriminate on the basis of sex imposed by Executive Order 11246, as amended; sections 799A and 845 of the Public Health Service Act (42 U.S.C. 295h-9 and 298b-2); Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.); the Equal Pay Act (29 U.S.C. 206 and 206(d)); and any other Act of Congress or Federal regulation.

(Secs. 901, 902, 905, Education Amendments of 1972, 86 Stat. 373, 374, 375; 20 U.S.C. 1681, 1682, 1685)

(b) *Effect of State or local law or other requirements.* The obligation to comply with this part is not obviated or alleviated by any State or local law or other requirement which would render any applicant or student ineligible, or limit the eligibility of any applicant or student, on the basis of sex, to practice any occupation or profession.

(c) *Effect of rules or regulations of private organizations.* The obligation to comply with this part is not obviated or alleviated by any rule or regulation of any organization, club, athletic or other league, or association which would render any applicant or student ineligible to participate or limit the eligibility or participation of any applicant or student, on the basis of sex, in any education program or activity operated by a recipient and which receives or benefits from Federal financial assistance.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 106.7 Effect of employment opportunities.

The obligation to comply with this part is not obviated or alleviated because employment opportunities in any occupation or profession are or may be more limited for members of one sex than for members of the other sex.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 106.8 Designation of responsible employee and adoption of grievance procedures.

(a) *Designation of responsible employee.* Each recipient shall designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under this part, including any investigation of any complaint communicated to such recipient alleging its noncompliance with this part or alleging any actions which would be prohibited by this par

The recipient shall notify all its students and employees of the name, office address and telephone number of the employee or employees appointed pursuant to this paragraph.

(b) *Complaint procedure of recipient.* A recipient shall adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging any action which would be prohibited by this part.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 106.9 Dissemination of policy.

(a) *Notification of policy.* (1) Each recipient shall implement specific and continuing steps to notify applicants for admission and employment, students and parents of elementary and secondary school students, employees, sources of referral of applicants for admission and employment, and all unions or professional organizations holding collective bargaining or professional agreements with the recipient, that it does not discriminate on the basis of sex in the educational programs or activities which it operates, and that it is required by title IX and this part not to discriminate in such a manner. Such notification shall contain such information, and be made in such manner, as the Assistant Secretary finds necessary to apprise such persons of the protections against discrimination assured them by title IX and this part, but shall state at least that the requirement not to discriminate in education programs and activities extends to employment therein, and to admission thereto unless Subpart C does not apply to the recipient, and that inquiries concerning the application of title IX and this part to such recipient may be referred to the employee designated pursuant to § 106.8, or to the Assistant Secretary.

(2) Each recipient shall make the initial notification required by paragraph (a)(1) of this section within 90 days of the effective date of this part or of the date this part first applies to such recipient, whichever comes later, which notification shall include publication in: (i) Local newspapers; (ii) newspapers and magazines operated by such recipient or by student, alumnae, or alumni groups for or in connection with such recipient; and (iii) memoranda or other written communications distributed to every student and employee of such recipient.

(b) *Publications.* (1) Each recipient shall prominently include a statement of the policy described in paragraph (a) of this section in each announcement, bulletin, catalog, or application form which it makes available to any person of a type, described in paragraph (a) of this section, or which is otherwise used in connection with the recruitment of students or employees.

(2) A recipient shall not use or distribute a publication of the type described in this paragraph which suggests, by text or illustration, that such recipient treats applicants, students, or employees differently on the basis of sex except as such treatment is permitted by this part.

(c) *Distribution.* Each recipient shall distribute without discrimination on the basis of sex each publication described in paragraph (b) of this section, and shall apprise each of its admission and employment recruitment representatives of the policy of nondiscrimination described in paragraph (a) of this section, and require such representatives to adhere to such policy.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

Subpart B—Coverage

§ 106.11 Application.

Except as provided in this subpart, this Part 86 applies to every recipient and to each education program or activity operated by such recipient which receives or benefits from Federal financial assistance.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.12 Educational institutions controlled by religious organizations.

(a) *Application.* This part does not apply to an educational institution which is controlled by a religious organization to the extent application of this part would not be consistent with the religious tenets of such organization.

(b) *Exemption.* An educational institution which wishes to claim the exemption set forth in paragraph (a) of this section, shall do so by submitting in writing to the Assistant Secretary a statement by the highest ranking official of the institution, identifying the provisions of this part which conflict with a specific tenet of the religious organization.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 106.13 Military and merchant marine educational institutions.

This part does not apply to an educational institution whose primary purpose is the training of individuals for a military service of the United States or for the merchant marine.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 106.14 Membership practices of certain organizations.

(a) *Social fraternities and sororities.* This part does not apply to the membership practices of social fraternities and sororities which are exempt from taxation under section 501(a) of the Internal Revenue Code of 1954, the active membership of which consists primarily of students in attendance at institutions of higher education.

(b) *YMCA, YWCA, Girl Scouts, Boy Scouts and Camp Fire Girls.* This part does not apply to the membership practices of the Young Men's Christian Association, the Young Women's Christian Association, the Girl Scouts, the Boy Scouts and Camp Fire Girls.

(c) *Voluntary youth service organizations.* This part does not apply to the membership practices of voluntary youth service organizations which are exempt from taxation under section 501(a) of the Internal Revenue Code of 1954 and the membership of which has been traditionally limited to members of one sex and principally to persons of less than nineteen years of age.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682; Sec. 3(a) of P.L. 93-568, 88 Stat. 1862 amending Sec. 901)

§ 106.15 Admissions.

(a) Admissions to educational institutions prior to June 24, 1973, are not covered by this part.

(b) *Administratively separate units.* For the purposes only of this section, §§ 86.16 and 86.17, and Subpart C, each administratively separate unit shall be deemed to be an educational institution.

(c) *Application of Subpart C.* Except as provided in paragraphs (d) and (e) of this section, Subpart C applies to each recipient. A recipient to which Subpart C applies shall not discriminate on the basis of sex in admission or recruitment in violation of that subpart.

(d) *Educational institutions.* Except as provided in paragraph (e) of this section as to recipients which are educational institutions, Subpart C applies only to institutions of vocational education, professional education, graduate higher education, and public institutions of undergraduate higher education.

(e) *Public institutions of undergraduate higher education.* Subpart C does not apply to any public institution of undergraduate higher education which traditionally and continually from its establishment has had a policy of admitting only students of one sex.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 106.16 Educational institutions eligible to submit transition plans.

(a) *Application.* This section applies to each educational institution to which Subpart C applies which:

(1) Admitted only students of one sex as regular students as of June 23, 1972; or

(2) Admitted only students of one sex as regular students as of June 23, 1965, but thereafter admitted as regular students, students of the sex not admitted prior to June 23, 1965.

(b) *Provision for transition plans.* An educational institution to which this section applies shall not discriminate on the basis of sex in admission or recruitment in violation of Subpart C unless it is carrying out a transition plan approved by the Secretary as described in § 106.17, which plan provides for the elimination of such discrimination by the earliest practicable date but in no event later than June 23, 1979.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 106.17 Transition plans.

(a) *Submission of plans.* An institution to which § 106.16 applies and which is composed of more than one administratively separate unit may submit either a single transition plan applicable to all such units, or a separate transition plan applicable to each such unit.

(b) *Content of plans.* In order to be approved by the Secretary a transition plan shall:

(1) State the name, address, and Federal Interagency Committee on Education (FICE) Code of the educational institution submitting such plan, the administratively separate units to which the plan is applicable, and the name, address, and telephone number of the person to whom questions concerning the plan may be addressed. The person who submits the plan shall be the chief administrator or president of the institution, or another individual legally authorized to bind the institution to all actions set forth in the plan.

(2) State whether the educational institution or administratively separate unit admits students of both sexes, as regular students and, if so, when it began to do so.

(3) Identify and describe with respect to the educational institution or administratively separate unit any obstacles to admitting students without discrimination on the basis of sex.

(4) Describe in detail the steps necessary to eliminate as soon as practicable each obstacle so identified and indicate the schedule for taking these steps and the individual directly responsible for their implementation.

(5) Include estimates of the number of students, by sex, expected to apply for, be admitted to, and enter each class during the period covered by the plan.

(c) *Nondiscrimination.* No policy or practice of a recipient to which § 106.16 applies shall result in treatment of applicants to or students of such recipient in violation of Subpart C unless such treatment is necessitated by an obstacle identified in paragraph (b)(3) of this section and a schedule for eliminating that obstacle has been provided as required by paragraph (b)(4) of this section.

(d) *Effects of past exclusion.* To overcome the effects of past exclusion of students on the basis of sex, each educational institution to which § 106.16 applies shall include in its transition plan, and shall implement, specific steps designed to encourage individuals of the previously excluded sex to apply for admission to such institution. Such steps shall include instituting recruitment programs which emphasize the institution's commitment to enrolling students of the sex previously excluded.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§§ 106.18–106.20 [Reserved]

Subpart C—Discrimination on the Basis of Sex in Admission and Recruitment Prohibited

§ 106.21 Admission.

(a) *General.* No person shall, on the basis of sex, be denied admission, or be subjected to discrimination in admission, by any recipient to which this subpart applies, except as provided in §§ 106.16 and 106.17.

(b) *Specific prohibitions.* (1) In determining whether a person satisfies any policy or criterion for admission, or in making any offer of admission, a recipient to which this Subpart applies shall not:

(i) Give preference to one person over another on the basis of sex, by ranking applicants separately on such basis, or otherwise;

(ii) Apply numerical limitations upon the number or proportion of persons of either sex who may be admitted; or

(iii) Otherwise treat one individual differently from another on the basis of sex.

(2) A recipient shall not administer or operate any test or other criterion for admission which has a disproportionately adverse effect on persons on the basis of sex unless the use of such test or criterion is shown to predict validly success in the education program or activity in question and alternative tests or criteria which do not have such a disproportionately adverse effect are shown to be unavailable.

(c) *Prohibitions relating to marital or parental status.* In determining whether a person satisfies any policy or criterion for admission, or in making any offer of admission, a recipient to which this subpart applies:

(1) Shall not apply any rule concerning the actual or potential parental, family, or marital status of a student or applicant which treats persons differently on the basis of sex;

(2) Shall not discriminate against or exclude any person on the basis of pregnancy, childbirth, termination of pregnancy, or recovery therefrom, or establish or follow any rule or practice which so discriminates or excludes;

(3) Shall treat disabilities related to pregnancy, childbirth, termination of pregnancy, or recovery therefrom in the same manner and under the same policies as any other temporary disability or physical condition; and

(4) Shall not make pre-admission inquiry as to the marital status of an applicant for admission, including whether such applicant is "Miss" or "Mrs." A recipient may make pre-admission inquiry as to the sex of an applicant for admission, but only if such inquiry is made equally of such applicants of both sexes and if the results of such inquiry are not used in connection with discrimination prohibited by this part.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 106.22 Preference in admission.

A recipient to which this subpart applies shall not give preference to applicants for admission, on the basis of attendance at any educational institution or other school or entity which admits as students only or predominantly members of one sex, if the giving of such preference has the effect of discriminating on the basis of sex in violation of this subpart.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 106.23 Recruitment.

(a) *Nondiscriminatory recruitment.* A recipient to which this subpart applies shall not discriminate on the basis of sex in the recruitment and admission of students. A recipient may be required to undertake additional recruitment efforts for one sex as remedial action pursuant to § 106.3(a), and may choose to undertake such efforts as affirmative action pursuant to § 106.3(b).

(b) *Recruitment at certain institutions.* A recipient to which this subpart applies shall not recruit primarily or exclusively at educational institutions, schools or entities which admit as students only or predominantly members of one sex, if such actions have the effect of criminating on the basis of sex in lation of this subpart.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§§ 106.24–106.30 [Reserved]

Subpart D—Discrimination on the Basis of Sex in Education Programs and Activities Prohibited

§ 106.31 Education programs and activities.

(a) *General.* Except as provided elsewhere in this part, no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any academic, extracurricular, research, occupational training, or other education program or activity operated by a recipient which receives or benefits from Federal financial assistance. This subpart does not apply to actions of a recipient in connection with admission of its students to an education program or activity of (1) a recipient to which Subpart C does not apply, or (2) an entity, not a recipient, to which Subpart C would not apply if the entity were a recipient.

(b) *Specific prohibitions.* Except as provided in this subpart, in providing any aid, benefit, or service to a student, a recipient shall not, on the basis of sex:

(1) Treat one person differently from another in determining whether such person satisfies any requirement or condition for the provision of such aid, benefit, or service;

(2) Provide different aid, benefits, or services or provide aid, benefits, or services in a different manner;

(3) Deny any person any such aid, benefit, or service;

(4) Subject any person to separate or different rules of behavior, sanctions, or other treatment;

(5) Discriminate against any person in the application of any rules of appearance;

(6) Apply any rule concerning the domicile or residence of a student or applicant, including eligibility for in-state fees and tuition;

(7) Aid or perpetuate discrimination against any person by providing significant assistance to any agency, organization, or person which discriminates on the basis of sex in providing any aid, benefit or service to students or employees;

(8) Otherwise limit any person in the enjoyment of any right, privilege, advantage, or opportunity.

(c) *Assistance administered by a recipient educational institution to study at a foreign institution.* A recipient educational institution may administer or assist in the administration of scholarships, fellowships, or other awards established by foreign or domestic wills, trusts, or similar legal instruments, or by acts of foreign governments and restricted to members of one sex, which are designed to provide opportunities to study abroad, and which are awarded to students who are already matriculating at or who are graduates of the recipient institution: *Provided,* a recipient educational institution which administers or assists in the administration of such scholarships, fellowship, or other awards which are restricted to members of one sex provides, or otherwise makes available reasonable opportunities for similar studies for members of the other sex. Such opportunities may be derived from either domestic or foreign sources.

(d) *Programs not operated by recipient.* (1) This paragraph applies to any recipient which requires participation by any applicant, student, or employee in any education program or activity not operated wholly by such recipient, or which facilitates, permits, or considers such participation as part of or equivalent to an education program or activity operated by such recipient, including participation in educational consortia and cooperative employment and student-teaching assignments.

(2) Such recipient:

(i) Shall develop and implement a procedure designed to assure itself that the operator or sponsor of such other education program or activity takes no action affecting any applicant, student, or employee of such recipient which this part would prohibit such recipient from taking; and

(ii) Shall not facilitate, require, permit, or consider such participation if such action occurs.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 106.32 Housing.

(a) *Generally.* A recipient shall not, on the basis of sex, apply different rules or regulations, impose different fees or requirements, or offer different services or benefits related to housing, except as provided in this section (including housing provided only to married students).

(b) *Housing provided by recipient.* (1) A recipient may provide separate housing on the basis of sex.

(2) Housing provided by a recipient to students of one sex, when compared to that provided to students of the other sex, shall be as a whole:

(i) Proportionate in quantity to the number of students of that sex applying for such housing; and

(ii) Comparable in quality and cost to the student.

(c) *Other housing.* (1) A recipient shall not, on the basis of sex, administer different policies or practices concerning occupancy by its students of housing other than provided by such recipient.

(2) A recipient which, through solicitation, listing, approval of housing, or otherwise, assists any agency, organization, or person in making housing available to any of its students, shall take such reasonable action as may be necessary to assure itself that such housing as is provided to students of one sex, when compared to that provided to students of the other sex, is as a whole: (i) Proportionate in quantity and (ii) comparable in quality and cost to the student. A recipient may render such assistance to any agency, organization, or person which provides all or part of such housing to students only of one sex.

(Secs. 901, 902, 907, Education Amendments of 1972, 86 Stat. 373, 374, 375; 20 U.S.C. 1681, 1682, 1686)

§ 106.33 Comparable facilities.

A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374)

§ 106.34 Access to course offerings.

A recipient shall not provide any course or otherwise carry out any of its education program or activity separately on the basis of sex, or require or refuse participation therein by any of its students on such basis, including health, physical education, industrial, business, vocational, technical, home economics, music, and adult education courses.

(a) With respect to classes and activities in physical education at the elementary school level, the recipient shall comply fully with this section as expeditiously as possible but in no event later than one year from the effective date of this regulation. With respect to physical education classes and activities at the secondary and post-secondary levels, the recipient shall comply fully with this section as expeditiously as possible but in no event later than three years from the effective date of this regulation.

(b) This section does not prohibit grouping of students in physical education classes and activities by ability as assessed by objective standards of individual performance developed and applied without regard to sex.

(c) This section does not prohibit separation of students by sex within physical education classes or activities during participation in wrestling, boxing, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact.

(d) Where use of a single standard of measuring skill or progress in a physical education class has an adverse effect on members of one sex, the recipient shall use appropriate standards which do not have such effect.

(e) Portions of classes in elementary and secondary schools which deal exclusively with human sexuality may be conducted in separate sessions for boys and girls.

(f) Recipients may make requirements based on vocal range or quality which may result in a chorus or choruses of one or predominantly one sex.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 106.35 Access to schools operated by L.E.A.s.

A recipient which is a local educational agency shall not, on the basis of sex, exclude any person from admission to:

(a) Any institution of vocational education operated by such recipient; or

(b) Any other school or educational unit operated by such recipient, unless such recipient otherwise makes available to such person, pursuant to the same policies and criteria of admission, courses, services, and facilities comparable to each course, service, and facility offered in or through such schools.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 106.36 Counseling and use of appraisal and counseling materials.

(a) *Counseling.* A recipient shall not discriminate against any person on the basis of sex in the counseling or guidance of students or applicants for admission.

(b) *Use of appraisal and counseling materials.* A recipient which uses testing or other materials for appraising or counseling students shall not use different materials for students on the basis of their sex or use materials which permit or require different treatment of students on such basis unless such different materials cover the same occupations and interest areas and the use of such different materials is shown to be essential to eliminate sex bias. Recipients shall develop and use internal procedures for ensuring that such materials do not discriminate on the basis of sex. Where the use of a counseling test or other instrument results in a substantially disproportionate number of members of one sex in any particular course of study or classification, the recipient shall take such action as is necessary to assure itself that such disproportion is not the result of discrimination in the instrument or its application.

(c) *Disproportion in classes.* Where a recipient finds that a particular class contains a substantially disproportionate number of individuals of one sex, the recipient shall take such action as is necessary to assure itself that such disproportion is not the result of discrimination on the basis of sex in counseling or appraisal materials or by counselors.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 106.37 Financial assistance.

(a) *General.* Except as provided in paragraphs (b) and (c) of this section, in providing financial assistance to any of its students, a recipient shall not: (1) On the basis of sex, provide different amount or types of such assistance, limit eligibility for such assistance which is of any particular type or source, apply different criteria, or otherwise discriminate; (2) through solicitation, listing, approval, provision of facilities or other services, assist any foundation, trust, agency, organization, or person which provides assistance to any of such recipient's students in a manner which discriminates on the basis of sex; or (3) apply any rule or assist in application of any rule concerning eligibility for such assistance which treats persons of one sex differently from persons of the other sex with regard to marital or parental status.

(b) *Financial aid established by certain legal instruments.* (1) A recipient may administer or assist in the administration of scholarships, fellowships, or other forms of financial assistance established pursuant to domestic or foreign wills, trusts, bequests, or similar legal instruments or by acts of a foreign government which requires that awards be made to members of a particular sex specified therein; *Provided,* That the overall effect of the award of such sex-restricted scholarships, fellowships, and other forms of financial assistance does not discriminate on the basis of sex.

(2) To ensure nondiscriminatory awards of assistance as required in subparagraph (b)(1) of this section, recipients shall develop and use procedures under which:

(i) Students are selected for award of financial assistance on the basis of nondiscriminatory criteria and not on the basis of availability of funds restricted to members of a particular sex;

(ii) An appropriate sex-restricted scholarship, fellowship, or other form of financial assistance is allocated to each student selected under subparagraph (b)(2)(i) of this paragraph; and

(iii) No student is denied the award for which he or she was selected under paragraph (b)(2)(i) of this section because of the absence of a scholarship, fellowship, or other form of financial assistance designated for a member of that student's sex.

(c) *Athletic scholarships.* (1) To the extent that a recipient awards athletic scholarships or grants-in-aid, it must provide reasonable opportunities for such awards for members of each sex in proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics.

(2) Separate athletic scholarships or grants-in-aid for members of each sex may be provided as part of separate athletic teams for members of each sex to the extent consistent with this paragraph and § 106.41.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682; and Sec. 844, Education Amendments of 1974, Pub. L. 93-380, 88 Stat. 484)

§ 106.38 Employment assistance to students.

(a) *Assistance by recipient in making available outside employment.* A recipient which assists any agency, organization or person in making employment available to any of its students:

(1) Shall assure itself that such employment is made available without discrimination on the basis of sex; and

(2) Shall not render such services to any agency, organization, or person which discriminates on the basis of sex in its employment practices.

(b) *Employment of students by recipients.* A recipient which employs any of its students shall not do so in a manner which violates Subpart E of this part.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 106.39 Health and insurance benefits and services.

In providing a medical, hospital, accident, or life insurance benefit, service, policy, or plan to any of its students, a recipient shall not discriminate on the basis of sex, or provide such benefit, service, policy, or plan in a manner which would violate

Subpart E of this part if it were provided to employees of the recipient. This tion shall not prohibit a recipient m providing any benefit or service ich may be used by a different proportion of students of one sex than of the other, including family planning services. However, any recipient which provides full coverage health service shall provide gynecological care.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 106.40 Marital or parental status.

(a) *Status generally.* A recipient shall not apply any rule concerning a student's actual or potential parental, family, or marital status which treats students differently on the basis of sex.

(b) *Pregnancy and related conditions.* (1) A recipient shall not discriminate against any student, or exclude any student from its education program or activity, including any class or extracurricular activity, on the basis of such student's pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery therefrom, unless the student requests voluntarily to participate in a separate portion of the program or activity of the recipient.

(2) A recipient may require such a student to obtain the certification of a physician that the student is physically and emotionally able to continue participation in the normal education gram or activity so long as such a ification is required of all students for other physical or emotional conditions requiring the attention of a physician.

(3) A recipient which operates a portion of its education program or activity separately for pregnant students, admittance to which is completely voluntary on the part of the student as provided in paragraph (b)(1) of this section shall ensure that the instructional program in the separate program is comparable to that offered to non-pregnant students.

(4) A recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom in the same manner and under the same policies as any other temporary disability with respect to any medical or hospital benefit, service, plan or policy which such recipient administers, operates, offers, or participates in with respect to students admitted to the recipient's educational program or activity.

(5) In the case of a recipient which does not maintain a leave policy for its students, or in the case of a student who does not otherwise qualify for leave der such a policy, a recipient shall t pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom as a justification for a leave of absence for so long a period of time as is deemed medically necessary by the student's physician, at the conclusion of which the student shall be reinstated to the status which she held when the leave began.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 106.41 Athletics.

(a) *General.* No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.

(b) *Separate teams.* Notwithstanding the requirements of paragraph (a) of this section, a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport. For the purposes of this part, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose of major activity of which involves bodily contact.

(c) *Equal opportunity.* A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available the Director will consider, among other factors:

(1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;

(2) The provision of equipment and supplies;

(3) Scheduling of games and practice time;

(4) Travel and per diem allowance;

(5) Opportunity to receive coaching and academic tutoring;

(6) Assignment and compensation of coaches and tutors;

(7) Provision of locker rooms, practice and competitive facilities;

(8) Provision of medical and training facilities and services;

(9) Provision of housing and dining facilities and services;

(10) Publicity.

Unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams if a recipient operates or sponsors separate teams will not constitute noncompliance with this section, but the Assistant Secretary may consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of each sex.

(d) *Adjustment period.* A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics at the elementary school level shall comply fully with this section as expeditiously as possible but in no event later than one year from the effective date of this regulation. A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics at the secondary or post-secondary school level shall comply fully with this section as expeditiously as possible but in no event later than three years from the effective date of this regulation.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682, and Sec. 844, Education Amendments of 1974, Pub. L. 93-380, 88 Stat. 484)

§ 106.42 Textbooks and curricular material.

Nothing in this regulation shall be interpreted as requiring or prohibiting or abridging in any way the use of particular textbooks or curricular materials.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§§ 106.43-106.50 [Reserved]

Subpart E—Discrimination on the Basis of Sex in Employment in Education Programs and Activities Prohibited

§ 106.51 Employment.

(a) *General.* (1) No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination in employment, or recruitment, consideration, or selection therefor, whether full-time or part-time, under any education program or activity operated by a recipient which receives or benefits from Federal financial assistance.

(2) A recipient shall make all employment decisions in any education program or activity operated by such recipient in a nondiscriminatory manner and shall not limit, segregate, or classify applicants or employees in any way

which could adversely affect any applicant's or employee's employment opportunities or status because of sex.

(3) A recipient shall not enter into any contractual or other relationship which directly or indirectly has the effect of subjecting employees or students to discrimination prohibited by this Subpart, including relationships with employment and referral agencies, with labor unions, and with organizations providing or administering fringe benefits to employees of the recipient.

(4) A recipient shall not grant preferences to applicants for employment on the basis of attendance at any educational institution or entity which admits as students only or predominantly members of one sex, if the giving of such preferences has the effect of discriminating on the basis of sex in violation of this part.

(b) *Application.* The provisions of this subpart apply to:

(1) Recruitment, advertising, and the process of application for employment;

(2) Hiring, upgrading, promotion, consideration for and award of tenure, demotion, transfer, layoff, termination, application of nepotism policies, right of return from layoff, and rehiring;

(3) Rates of pay or any other form of compensation, and changes in compensation;

(4) Job assignments, classifications and structure, including position descriptions, lines of progression, and seniority lists;

(5) The terms of any collective bargaining agreement;

(6) Granting and return from leaves of absence, leave for pregnancy, childbirth, false pregnancy, termination of pregnancy, leave for persons of either sex to care for children or dependents, or any other leave;

(7) Fringe benefits available by virtue of employment, whether or not administered by the recipient;

(8) Selection and financial support for training, including apprenticeship, professional meetings, conferences, and other related activities, selection for tuition assistance, selection for sabbaticals and leaves of absence to pursue training;

(9) Employer-sponsored activities, including social or recreational programs; and

(10) Any other term, condition, or privilege of employment.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 106.52 Employment criteria.

A recipient shall not administer or operate any test or other criterion for any employment opportunity which has a disproportionately adverse effect on persons on the basis of sex unless:

(a) Use of such test or other criterion is shown to predict validly successful performance in the position in question; and

(b) Alternative tests or criteria for such purpose, which do not have such disproportionately adverse effect, are shown to be unavailable.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 106.53 Recruitment.

(a) *Nondiscriminatory recruitment and hiring.* A recipient shall not discriminate on the basis of sex in the recruitment and hiring of employees. Where a recipient has been found to be presently discriminating on the basis of sex in the recruitment or hiring of employees, or has been found to have in the past so discriminated, the recipient shall recruit members of the sex so discriminated against so as to overcome the effects of such past or present discrimination.

(b) *Recruitment patterns.* A recipient shall not recruit primarily or exclusively at entities which furnish as applicants only or predominantly members of one sex if such actions have the effect of discriminating on the basis of sex in violation of this subpart.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 106.54 Compensation.

A recipient shall not make or enforce any policy or practice which, on the basis of sex:

(a) Makes distinctions in rates of pay or other compensation;

(b) Results in the payment of wages to employees of one sex at a rate less than that paid to employees of the opposite sex for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 106.55 Job classification and structure.

A recipient shall not:

(a) Classify a job as being for males or for females;

(b) Maintain or establish separate lines of progression, seniority lists, career ladders, or tenure systems based on sex; or

(c) Maintain or establish separate lines of progression, seniority systems, career ladders, or tenure systems for similar jobs, position descriptions, or job requirements which classify persons on the basis of sex, unless sex is a bona-fide occupational qualification for the positions in question as set forth in § 106.61.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 106.56 Fringe benefits.

(a) *"Fringe benefits" defined.* For purposes of this part, "fringe benefits" means: Any medical, hospital, accident, life insurance or retirement benefit, service, policy or plan, any profit-sharing or bonus plan, leave, and any other benefit or service of employment not subject to the provision of § 106.54.

(b) *Prohibitions.* A recipient shall not:

(1) Discriminate on the basis of sex with regard to making fringe benefits available to employees or make fringe benefits available to spouses, families, or dependents of employees differently upon the basis of the employee's sex;

(2) Administer, operate, offer, or participate in a fringe benefit plan which does not provide either for equal periodic benefits for members of each sex, or for equal contributions to the plan by such recipient for members of each sex; or

(3) Administer, operate, offer, or participate in a pension or retirement plan which establishes different optional or compulsory retirement ages based on sex or which otherwise discriminates in benefits on the basis of sex.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 106.57 Marital or parental status.

(a) *General.* A recipient shall not apply any policy or take any employment action:

(1) Concerning the potential marital, parental, or family status of an employee or applicant for employment which treats persons differently on the basis of sex; or

(2) Which is based upon whether an employee or applicant for employment is the head of household or principal wage earner in such employee's or applicant's family unit.

(b) *Pregnancy.* A recipient shall not discriminate against or exclude from employment any employee or applicant for employment on the basis of pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery therefrom.

(c) *Pregnancy as a temporary disability.* A recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy, and recovery therefrom and any temporary disability resulting therefrom as any other temporary disability for all job related purposes, including commencement, duration and extensions of leave, payment of disability income, accrual of seniority and any other benefit or service, and reinstatement, and under any fringe benefit offered to employees by virtue of employment.

(d) *Pregnancy leave.* In the case of a recipient which does not maintain a leave policy for its employees, or in the case of an employee with insufficient leave or accrued employment time to qualify for leave under such a policy, a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom as a justification for a leave of absence without pay for a reasonable period of time, at the conclusion of which the employee shall be reinstated to the status which she held when the leave began or to a comparable position, without decrease in rate of compensation or loss of promotional opportunities, or any other right or privilege of employment.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 106.58 Effect of State or local law or other requirements.

(a) *Prohibitory requirements.* The obligation to comply with this subpart is not obviated or alleviated by the existence of any State or local law or other requirement which imposes prohibitions or limits upon employment of members of one sex which are not imposed upon members of the other sex.

(b) *Benefits.* A recipient which provides any compensation, service, or benefit to members of one sex pursuant to a State or local law or other requirement shall provide the same compensation, service, or benefit to members of the other sex.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 106.59 Advertising.

A recipient shall not in any advertising related to employment indicate preference, limitation, specification, or discrimination based on sex unless sex is a *bona-fide* occupational qualification for the particular job in question.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 106.60 Pre-employment inquiries.

(a) *Marital status.* A recipient shall not make pre-employment inquiry as to the marital status of an applicant for employment, including whether such applicant is "Miss or Mrs."

(b) *Sex.* A recipient may make pre-employment inquiry as to the sex of an applicant for employment, but only if such inquiry is made equally of such applicants of both sexes and if the results of such inquiry are not used in connection with discrimination prohibited by this part.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 106.61 Sex as a bona-fide occupational qualification.

A recipient may take action otherwise prohibited by this subpart provided it is shown that sex is a bona-fide occupational qualification for that action, such that consideration of sex with regard to such action is essential to successful operation of the employment function concerned. A recipient shall not take action pursuant to this section which is based upon alleged comparative employment characteristics or stereotyped characterizations of one or the other sex, or upon preference based on sex of the recipient, employees, students, or other persons, but nothing contained in this section shall prevent a recipient from considering an employee's sex in relation to employment in a locker room or toilet facility used only by members of one sex.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§§ 106.62-106.70 [Reserved]

Subpart F—Procedures [Interim]

§ 106.71 Procedures.

The procedural provisions applicable to title VI of the Civil Rights Act of 1964 are hereby adopted and incorporated herein by reference. These procedures may be found at 34 CFR 100.6-100.11 and 34 CFR Part 101.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

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Appendix A—Guidelines for Eliminating Discrimination and Denial of Services on the Basis of Race, Color, National Origin, Sex, and Handicap in Vocational Education Programs

Note.—For the text of these guidelines, see 34 CFR Part 100, Appendix B

[44 FR 17168, Mar. 21, 1979]

[FR Doc. [illegible] Filed [illegible] am]

BILLING CODE [illegible]

DEPARTMENT OF EDUCATION

34 CFR Part 106

Nondiscrimination on the Basis of Sex in Education Programs and Activities Receiving or Benefiting From Federal Financial Assistance

AGENCY: Education Department.

ACTION: Final regulations.

SUMMARY: The Secretary of Education amends the Title IX regulation (nondiscrimination on the basis of sex) by revoking § 106.31(b)(5) which prohibits discrimination in the application of codes of personal appearance. This amendment permits the Department to concentrate its resources on cases involving more serious allegations of sex discrimination. Development and enforcement of appearance codes is an issue for local determination.

EFFECTIVE DATE: Unless Congress takes certain adjournments, these regulations will take effect 45 days after publication in the Federal Register. If you want to know if there has been a change in the effective date of these regulations, call or write the Department of Education contact person. At a future date, the Secretary will publish a notice in the Federal Register stating the effective date of these regulations.

ADDRESSES: Any questions concerning these regulations should be addressed to Harry M. Singleton, Acting Assistant Secretary for Civil Rights, 400 Maryland Avenue, SW. (Room 5000 Switzer Building), Washington, D.C. 20202.

FOR FURTHER INFORMATION CONTACT: Mr. Antonio J. Califa, Telephone No. (202) 245–2166

SUPPLEMENTARY INFORMATION: Revocation of this subparagraph of the Title IX regulations permits issues involving codes of personal appearance to be resolved at the local level. The Department will concentrate on enforcing Title IX in cases involving more serious allegations of sex discrimination. There is no indication in the legislative history of Title IX that Congress intended to authorize Federal regulations in the area of appearance codes.

A Notice of Proposed Rulemaking was published in the Federal Register on April 22, 1981 (46 FR 22801). Interested persons were given until May 29 to submit written comments. A summary comment analysis and the Department's response follows.

Section 106.31(b)(5)

Fifty-three comments were received regarding revocation of § 106.31(b)(5). Of these, thirty-one favored the rescission, seventeen opposed it, and five expressed no clear opinion. Twenty-two of the comments favoring the amendment specifically mentioned the need to allow appearance code matters to be resolved by the local community.

Comment: Many commenters supported the Department's proposal to leave appearance codes to local determination. Some commenters stated that the proposed rule would remove an area of overregulation by the Federal government. Others stated that the Department was unnecessarily burdened by the enforcement of requirements such as the regulation on appearance codes.

Response: The Department agrees with the commenters and has revoked the appearance code regulation.

Comment: Some commenters opposed the elimination of appearance codes as an area for Federal regulation under Title IX. These commenters stated that appearance codes encourage restrictive stereotyped roles for male and female students and foster an atmosphere which is not conducive to equal educational opportunity. Some commenters expressed concern that individual liberties would be restricted as a result of the proposed regulatory amendment. Others cited the symbolic value of the appearance code regulation and stated that its elimination would indicate to school administrators that restrictions on educational opportunities based solely on a student's gender are appropriate.

Response: The Department does not take any position regarding the adoption of appearance codes by local school districts since this is a matter that should be left to local discretion. The Department does not believe that the regulatory change will lead to restrictions on individual liberty. The amendment does not indicate any lack of resolve on the part of the Department to vigorously enforce the Title IX regulation. On the contrary, one result of the regulatory amendment will be to permit the concentration of resources on areas of the Title IX regulation which are more central to the statute's prohibition of discrimination on the basis of sex in education programs which receive Federal financial assistance.

Regulatory Flexibility Act Certification

The Secretary certifies that this regulation will not have a significant economic impact on a substantial number of small entities. These regulations are administrative and do not affect any small entities.

List of Subjects in 34 CFR Part 106

Civil rights, Grant programs—Education, Sex discrimination, Vocational education, Women.

Dated: June 7, 1982.

T. H. Bell,
Secretary of Education.

Approved: July 2, 1982.

William French Smith,
Attorney General.

PART 106—NONDISCRIMINATION ON THE BASIS OF SEX IN EDUCATION PROGRAMS AND ACTIVITIES RECEIVING OR BENEFITING FROM FEDERAL FINANCIAL ASSISTANCE

The Secretary amends Title 34 of the Code of Federal Regulations as follows:

§ 106.31 [Amended]

In § 106.31, paragraph (b)(5) is revoked and removed, and paragr (b)(6)–(8) are redesignated as (b)(5,

[FR Doc. 82-[illegible] Filed 7-27-82; 8:45 am]
BILLING CODE 4000-01-M

VETERANS ADMINISTRATION

DEPARTMENT OF DEFENSE

38 CFR Part 21

Veterans' Educational Assistance Program; Advance Payments

AGENCIES: Veterans Administration; Department of Defense.

ACTION: Final regulation.

SUMMARY: This regulation, adopted jointly by the Veterans Administra and the Department of Defense, per the advance payment of educational assistance allowance to participants the Post-Vietnam Era Veterans Educational Assistance Program following breaks in enrollment of mo than 30 days. Previously, if a break ha be more than a calendar month befo the Veterans Administration could an advance payment. This resulted some instances where an individual could not be paid for the interval between terms, and could not receiv advance payment for the next term. regulation eliminates this inequity.

EFFECTIVE DATE: July 8, 1982.

FOR FURTHER INFORMATION CONTACT: June C. Schaeffer (223), Assistant Director for Policy and Program Administration, Education Service, Department of Veterans Benefits, Veterans Administration, 810 Verm Avenue, NW., Washington, D.C. 204 (202-389-2092).

SUPPLEMENTARY INFORMATION: On 22963 of the Federal Register of Ma 28, 1982 there was published a notic intent to amend part 21 to permit advance payments of educational assistance allowance following bre in enrollment of more than 30 days.

Interested persons were given 30 in which to submit comments, suggestions, or objections regarding proposal. The Veterans Administra and Department of Defense receive comments. Accordingly, the agenci are adopting the proposal.

The agencies have determined th this regulation is not a major rule a term is defined by Executive Order 12291, Federal Regulation. The ann effect on the economy will be less $100 million. It will not result in a major increases in the costs or pric proposed regs NPRM

federal register

THURSDAY, JUNE 20, 1974
WASHINGTON, D.C.
Volume 39 ■ Number 120
PART II

THE NATIONAL ARCHIVES OF THE UNITED STATES • 1934 •

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

Office of the Secretary

■

EDUCATION PROGRAMS AND ACTIVITIES RECEIVING OR BENEFITING FROM FEDERAL FINANCIAL ASSISTANCE

Nondiscrimination on the Basis of Sex

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

Office of the Secretary

[45 CFR Part 86]

EDUCATION PROGRAMS AND ACTIVITIES RECEIVING OR BENEFITING FROM FEDERAL FINANCIAL ASSISTANCE

Nondiscrimination on the Basis of Sex

The Office of Civil Rights of the Department of Health, Education, and Welfare proposes to add Part 86 to the Departmental Regulation to effectuate Title IX of the Education Amendments of 1972 (20 U.S.C. §§ 1681 *et seq.*), except sections 904 and 906 thereof (20 U.S.C. 1684 and 1686), with regard to Federal financial assistance administered by the Department. Title IX provides that "no person in the United States shall on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance," with certain exceptions. Title IX is similar to Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d *et seq.*) except that Title IX applies to discrimination based on sex, is limited to educational programs and activities, and includes employment.

Subpart A of these proposed regulations (§§ 86.1 through 86.9) includes definitions and provisions concerning: remedial and affirmative actions, required assurances, dissemination of information policies, and other general matters related to discrimination on the basis of sex. The Subpart also explains the effect of state or local laws and other requirements.

Subpart B (§§ 86.11 through 81.16) describes the educational institutions and other entities, whether public or private, which are covered in whole or in part by the proposed regulations. It also includes exemptions as to admissions for certain educational institutions, as set forth in the statute, but it should be noted that these exemptions are limited to admissions. This Subpart defines "admissions," and describes certain educational institutions which are eligible to submit transition plans designed to convert their single-sex admissions processes to nondiscriminatory processes over a stated period of time not to exceed seven years from the date of enactment of Title IX (i.e. by June 24, 1979).

Subpart C (§§ 86.21 through 86.23) sets forth the general and particular prohibitions with respect to nondiscrimination based on sex in admissions policies and admission preferences, including requirements concerning recruitment of students. The regulatory requirements regarding treatment of students and employment (Subparts D and E) are applicable to all educational institutions receiving Federal financial assistance, including those whose admissions are exempt under Subpart C.

Subpart D (§§ 86.31 through 86.38) sets forth the general rules with respect to prohibited discrimination in educational programs and activities. The specific subject matter covered in Subpart D includes discrimination on the basis of sex in academic research, extracurricular and other offerings, housing, facilities, access to programs and activities, financial and employment assistance to students, health and insurance benefits for students, physical education and instruction, athletics, and discrimination based on the marital or parental status of students.

Subpart E (§§ 86.41 through 86.51) sets forth the general rules with respect to employment in educational programs and activities. The specific subject matters covered are discrimination on the basis of sex in hiring and employment criteria, recruitment, compensation, job classification and structure, promotions and termination, fringe benefits and leave, advertising, pre-employment inquiries, and discrimination with respect to marital or parental status. It also includes provisions for exemptions where sex is a bona fide occupational qualification.

Subpart F (§§ 86.61 through 86.66) sets forth the procedures which would govern the implementation of the proposed regulations, including procedures for effecting compliance, conducting hearings, rendering decisions and issuing notices. It also includes provisions concerning the applicability of administrative and judicial review. Section 86.11, in Subpart A, provides that the regulations apply "to each education program or activity which receives or benefits from Federal financial assistance" administered by the Department. Under analogous cases involving constitutional prohibitions against racial discrimination, the courts have held that a school district's or college's education functions include any service, facility, activity or program which it operates or sponsors, including athletics and other extracurricular activities. These precedents have been followed with regard to sex discrimination, see Brenden v Independent School District 742, 477 F 2d 1292 (8th Cir. 1973).

Section 86.63(c), in Subpart F, provides, as Title IX requires in 20 U.S.C. 1682, that termination or refusal to grant or continue such assistance "shall be limited in its effect to the particular education program or activity" in which noncompliance has been found. The Secretary proposes to interpret section 86.63 (c) consistently with the interpretation of similar language contained in Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d–1). He proposes, therefore, that an education program or activity or part thereof operated by a recipient of Federal financial assistance administered by the Department will be subject to the requirements of this regulation if it receives or benefits from such assistance. This interpretation is consistent with the leading case interpreting the language contained in Title VI, which holds that Federal funds may be terminated under Title VI only upon a finding they "are administered in a discriminatory manner, or if they support a program which is infected by a discriminatory environment * * *" Board of Public Instruction of Taylor County, Florida v. Finch, 414 F. 2d 1068, 1078–79 (5th Cir. 1969).

A more detailed discussion of various sections in each of the Subparts of the proposed Title IX regulations is set forth in the following paragraphs. In certain cases, major issues and the reasons for the proposed decision are discussed.

Subpart A. Section 86.2 generally provides definitions. Of particular note is § 86.2(o) which provides that where an educational institution is composed of more than one school, department, or college, admission to which is independent of admission to any other component, each such school, department or college is considered as a separate unit for the purposes of determining whether its admissions are covered by the regulation. Thus, if a private institution is composed of an undergraduate and a graduate college, admissions to the undergraduate college are exempt (see discussion under Subpart B below) but admissions to the graduate school are not.

Section 86.3(a) requires remedial action to overcome the effects of previous discrimination based on sex in a Federally assisted educational program or activity. Remedial action pursuant to § 86.3(a) is restricted to areas of a recipient's educational program or activity which are not exempt from coverage. Section 86.3(b) permits, but does not require, affirmative action to overcome the effects of conditions which have resulted in limited participation by members of either sex. The Department will not require imposition of quotas under either of these sections.

Section 86.4 requires each recipient of Federal financial assistance to submit to the Director an assurance that each of its educational programs and activities receiving or benefiting from such assistance will be conducted in compliance with the regulations.

Subpart B. Section 86.13 of the regulation provides that all public and private military schools that are recipients of Federal financial assistance, whether secondary or post-secondary, are exempt from coverage. Neither the statute nor the regulation applies to U.S. military and merchant marine academies since these schools are Federal entities rather than recipients of Federal assistance.

Section 86.12 provides that the regulation does not apply to religiously controlled institutions to the extent that such application would be inconsistent with the religious tenets of the controlling organization. An educational institution wishing to claim an exemption on the ground of religion must do so in writing to the Director when it files its assurance of compliance pursuant to § 86.4. The institution would be required to set forth the manner and extent to which application of the regulation would not be consistent with the religious tenets of its controlling organization.

The statute covers admissions to in certain institutions: vocational, professional, graduate, and public undergraduate institutions, except such of the latter as from their founding have been traditionally and continually single-sex. The admissions policies of private undergraduate institutions are exempt. Under the statute and § 86.14, the admissions requirements do not apply, in general, to admissions to public or private preschool, elementary and second schools. Because the statute mandates such coverage as to vocational schools, however, admission to public or private vocational schools, whether at the junior high school, high school or post-secondary level, are covered by § 86.14(c) and must be nondiscriminatory. With respect to coverage of admissions to institutions of professional and vocational education, the Secretary has interpreted the statute as excluding admissions coverage of professional and vocational programs offered at private undergraduate schools. Thus, admission to programs leading to first degrees in fields such as teaching, engineering, and architecture at such private colleges will be exempt under § 86.14(d). While the admissions section of the statute might be read as including professional degrees wherever they are offered, the statute can also be read as stating, and the legislative history indicates that admissions to private undergraduate schools were to be totally exempt.

The exemption in § 86.14(d) for admissions to public traditionally and continually single-sex undergraduate institutions will affect only a few institutions. Likewise, section 86.15 of the regulation, concerning transition by single-sex institutions whose admissions are covered by the statute into institutions with nondiscriminatory admissions practices, will affect relatively few institutions.

Subpart C. Subpart C prescribes (subject to the appropriate admissions exemptions) requirements for nondiscrimination in recruitment and admission of students to educational programs and activities. In addition to a general prohibition of discrimination in § 86.21(a), the regulations delineate, in § 86.21(b), specific prohibitions based on sex relating to such practices as ranking of applicants, application of quotas, and administration of tests or selection criteria. Use of tests for admission which are shown to have an adverse impact on members of one sex must be shown to predict validly the successful completion of the educational program or activity in question (§ 86.21(b)(2)). Further, in connection with this prohibition, § 86.22 of the regulation forbids a recipient from giving preference to applicants on the basis of their attendance at particular institutions if the preference results in discrimination on the basis of sex. Such preferences may be permissible under that section, however, if the granting institution can show that the pool of applicants eligible for such a preference includes roughly equivalent numbers of males and females, or if it can show that the total number of applicants eligible to receive the preference is insignificant in comparison to its total applicant pool.

Specific prohibitions in Subpart C also forbid applying rules concerning such matters as marital or parental status in a manner which discriminates in admissions on the basis of sex (§ 86.21(c)(1)). Section 86.21(c)(2) prohibits discrimination on the basis of pregnancy and related conditions, and § 86.21(c)(3) provides that recipients shall treat disabilities related to such conditions in the same manner and under the same policies as any other temporary disability or physical condition is treated.

The last section of Subpart C, § 86.23, requires generally that comparable efforts be made by educational institutions to recruit members of each sex. Additional recruitment efforts directed primarily toward members of one sex must be undertaken to remedy past discrimination (pursuant to § 86.3(a) in Subpart A), and such additional efforts may also be taken absent past discrimination in order to correct the effects of conditions which have had the effect of limiting the admissions of members of one sex to the recipient's educational program or activity (pursuant to § 86.3(b)). Finally, a recipient may not, under § 86.23(b), recruit primarily or exclusively at institutions whose student bodies are exclusively or predominantly single-sex if the effect of such recruitment efforts is to discriminate on the basis of sex.

Subpart D. Subpart D concerns the prohibition of discrimination in treatment of students in educational programs and activities. Generally, § 86.31(a) states that no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any academic, extracurricular, research, occupational training or other educational program or activity operated by a recipient and which receives or benefits from Federal financial assistance. This provision is followed by specific prohibitions in § 86.31(b) which include discriminating on the basis of sex in the application of any rules of appearance, or in the application of rules of domicile and residency (as discussed below), and aiding or perpetuating sex discrimination by assisting any agency, organization or person which discriminates on the basis of sex in providing any aid, benefits, or services to students or employees. Section 86.31(a) does permit an institution to assist its students in seeking admission to an education program which discriminates, if that admissions discrimination would be permissible under Subpart C. For example, a public undergraduate institution may administer an exchange program with a private undergraduate institution which admits only students of one sex because Subpart C permits the private institution to have such an admissions policy.

Section 86.31(b)(6) forbids application by recipients of residency and domicile rules in a manner which discriminates on the basis of sex. For example, many educational institutions base their determinations of eligibility for in-state tuition on domicile, applicable state law may require a married woman to take the domicile of her husband as of the date of marriage, or further require a year of residency to demonstrate domicile. If a male student domiciled in State A marries a female student domiciled in State B, and they then move to State B where the woman continues in school and the man begins school he may not be entitled to in-state tuition in State B until he has lived there for a year. Additionally, as the wife must take her husband's domicile, she will lose her in-state tuition eligibility. If, instead the woman were from State A and the man from State B, both would have been entitled immediately to in-state tuition in State B. Application of such rules would be prohibited under § 86.31(b)(6). See Samuel v. University of Pittsburgh et al. F. Supp. (W.D. Pa., No. 71-1202, April 10, 1974).

Section 86.31(b)(7) prohibits a recipient from assisting another party which discriminates on the basis of sex in serving students or employees of that recipient. This section might apply, for example, to financial support by the recipient to a community recreational group or to official institutional sanction of a professional or social organization. Among the criteria to be considered in each case are the substantiality of the relationship between the recipient subject to the regulation and the other party involved, including the financial support by the recipient, and whether the other party's activities relate so closely to the recipient's educational program or activity, or to students or employees in that program, that they fairly should be considered as activities of the recipient itself. (Under § 86.6(c), a recipient's obligations are not changed by membership in any league or other organization whose rules require or permit discrimination on the basis of sex.)

A recipient is required to develop and implement a procedure to ensure that the operator or sponsor of any other program or activity not operated wholly by such recipient, in which the recipient assists participation of its students and employees, takes no action which the regulation would prohibit the recipient from taking. This requirement would apply, for example, to a college's responsibility to ensure nondiscrimination in the assignments of student teachers of its education school in schools not operated by the college. If the recipient finds that such discrimination is taking place and is unable to secure its prompt elimination, it is required to end its cooperation with the operating or sponsoring entity (§ 86.31(c)).

With respect to housing, the regulations provide that a recipient may not discriminate in any aspect of the provision of housing except that, as provided in the statute, housing may be separate on the basis of sex. Thus, all rules, fees and other requirements must not discriminate on the basis of sex and housing provided or otherwise made available (e.g. through listings) must be proportionate in quantity to the number of applicants for housing of each sex and comparable in quality and cost to the student. Moreover, a recipient must not apply rules concerning off-campus housing (e.g. rules concerning which students

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may live off campus) without discrimination. To the extent that it approves, or assists students in obtaining, off-campus housing, it must take whatever steps it believes necessary to assure that the off-campus housing available to members of one sex, when compared to that available to members of the other sex, is proportionate in quantity to the numbers of applicants of each sex as well as comparable in quality and cost.

Separate toilet, locker room and shower facilities on the basis of sex may be provided, but such facilities as are provided must be comparable in quality and number for men and women (§ 86.33).

Section 86.34(a) covers access to course offerings and other aspects of a recipient's educational program or activity. No course offerings may be conducted separately on the basis of sex including health, physical education, industrial arts, business, vocational, technical, home economics, music, and adult education, and no student may be required to participate or be refused participation in any course offering on the basis of sex. Section 86.34(b) provides that local educational agencies, in which admission to individual schools are exempt, nevertheless may not discriminate in admissions to the vocational institutions (see Subpart B). In addition, they may not discriminate in admissions to any other school or educational unit which they operate (*e.g.* a special high school operated for boys) unless they otherwise make available to students of the sex excluded, pursuant to the same policies and criteria of admission, comparable courses, services and facilities. Section 86.34(d) requires use of nondiscriminatory appraisal and counseling materials.

The Department recognizes that sex stereotyping in curricula and educational materials is a serious problem to which Title IX could well apply, but the Department has concluded that specific regulatory provisions in this area would raise grave constitutional problems concerning the right of free speech under the First Amendment to the Constitution, and for that reason the Secretary has not covered this subject matter in the proposed regulation. The Department assumes that recipients will deal with this problem in the exercise of their general authority and control over curricula and course content. For its part, the Department will increase its efforts, through the Office of Education, to provide research, assistance and guidance to local education agencies in eliminating sex bias from curricula and educational materials.

Section 86.35 requires that provision of financial aid, assistance in making outside employment available to students, and employment of students by a recipient must be undertaken in a nondiscriminatory manner.

Section 86.35(a) prohibits different amounts and types of all forms of student financial aid to members of one sex. Section 86.35(a) prohibits a college or university subject to Title IX from assisting private fellowship or scholarship programs which are limited to members of one sex or for which members of each sex are selected separately. There may be appropriate remedial action in this area, including temporarily considering a student's sex in awarding financial aid. This section does not apply to a recipient's assisting in the administration of a scholarship or fellowship program established under a foreign will, trust or similar legal instrument, or by a foreign government, which differentiates between the sexes. The Secretary believes that the statute was not intended to cover such programs. The Secretary is aware of the problems raised by financial aid limited to members of one sex by a domestic bequest, deed of trust, or other instruments and invites comment in this area.

Under § 86.36, recipients may not discriminate in the provision of medical, hospital, accident, or life insurance benefits, services, policies or plans to any of their students, and recipients may not provide such benefits, service, policies or plans or otherwise discriminate, in any manner which would violate the employment sections of the regulation (Subpart E) if the action were to be taken with respect to employees. The section does not, however, prohibit recipients from providing any benefits or services which may be used by a different proportion of students of one sex than of the other, including but not limited to family planning services.

Section 86.37 provides generally that recipients may not apply rules concerning a student's actual or potential parental, family, or marital status in a discriminatory manner, and it provides specific prohibitions regarding discrimination against students on account of pregnancy, childbirth, or pregnancy-related disabilities. A student may not be excluded from regular classes because of pregnancy or related conditions unless she so requests or unless her physician certifies that a different arrangement is necessary. The regulation reflects the principle that disabilities related to pregnancy should be treated like any other disability.

Section 86.38 imposes requirements concerning physical education and athletic programs, which are integral parts of the educational processes of schools and colleges and are fully subject to the requirements of Title IX. See Brenden v. Independent School District 742, 477 F. 2d 1292, 1292-96 (8th Cir. 1973); compare Bucha v. Illinois High School Association, 351 F. Supp. 69 (N.D. Ill. 1972).

Section 86.38(a) provides that physical education classes and athletic programs must be operated without discrimination on the basis of sex. Such activities for which participation or selection is premised on factors other than skill may not be conducted separately on the basis of sex. Athletics for which selection is based on competitive skill may be provided through separate teams for males and females to the extent such teams comply with the requirements of §§ 86.38 (b) through (e), which are summarized below. (The award of scholarships for participation on a single sex team will not be interpreted as a single sex scholarship prohibited by § 86.35(a) so long as the recipient complies with the requirements of § 86.38, providing for equal opportunity in athletics.)

Recipients must determine in what sports students of both sexes desire to participate (§ 86.38(b)). Where athletic opportunities for students of one sex have previously been limited, a recipient must make affirmative efforts to inform students of that sex of the availability of equal opportunities for them, and to provide support and training to enable them to participate in those opportunities (§ 86.38(c)).

Section 86.38(d) requires that a recipient make affirmative efforts to provide athletic opportunities in such sports and through such teams as will most effectively equalize opportunities for members of both sexes, and in so doing consider the determinations of student interest made pursuant to § 86.38(b). The regulation does not require equal aggregate expenditures for athletics for members of each sex nor equal expenditures for each team (§ 86.38(e)).

Subpart E. Subpart E proposes requirements concerning employment which generally follow those of the Equal Employment Opportunity Commission (29 CFR Part 1604), and the Department of Labor's Office of Federal Contract Compliance (41 CFR Part 60). The EEOC administers Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination, and the OFCC is responsible for the coordination of implementation of Executive Order 11246 as amended, which prohibits employment discrimination by Federal contractors. This Department is responsible for administration, pursuant to the OFCC regulations, of the Executive Order as to Federal contractors which are educational institutions. Virtually all recipients subject to Part 86 are also subject to Title VII, and many are also subject to the Executive Order. Where Subpart E of Title IX differs from either the Title VII regulations or those under Executive Order 11246, an employer who complies with this proposed regulation would also be complying with both Title VII and Executive Order, even where the latter provisions differ from each other with the exception of fringe benefits as discussed in the following paragraph.

Section 86.46(b)(2) of Subpart E follows the Executive Order regulations in requiring that fringe benefit plans provide for either equal periodic benefits to members of each sex, or equal contributions by the employer for members of each sex (§ 86.36 imposes identical requirements for student benefit plans.

The Title VII regulation differs in that it prohibits payment of unequal periodic benefits on the basis of sex, and precludes employers from justifying unequal periodic benefits on the basis of differences in cost for males and for females. Assuming different life spans at particular ages between the sexes, and assuming equal contributions by all employees, Title VII implicitly requires payment of higher employer contributions for and the possibility of higher total benefits received by women. (The Department of Labor is currently considering changes in the Executive Order regulations. One of the proposed changes would result in conforming the fringe benefit requirements with those in effect under Title VII. (See 38 FR 35336-38, December 27, 1973.)

The Secretary has considered a third alternative for possible adoption by the Department. That proposal would mandate the use of premium or rate tables which do not differentiate on the basis of sex, and would thus require both equal contributions and equal periodic benefits. The Secretary invites comment specifically on whether § 86.46(b)(2) should adopt the Executive Order approach, as it does presently, that of Title VII, or the third alternative as set forth above.

The regulation applies to part-time employees § 86.41(a)(2)). The Secretary will interpret the section concerning fringe benefits (§ 86.46) to require, where an institution's female permanent employees are disproportionately part-time or its permanent part-time employees are disproportionately female, and the institution does not provide its permanent part-time employees fringe benefits proportionate to those provided full-time employees, that the institution demonstrate that such a manner of providing fringe benefits does not discriminate on the basis of sex. "Permanent" would refer to any employee who is expected to work or has in fact worked at least one academic semester at half-time or half-time equivalent. The Secretary seeks comment on the implications of requiring all institutions to provide permanent part-time employees fringe benefits proportionate to those offered full-time employees, regardless of the relative composition of a particular institution's part-time and full-time work forces or of the ratio of part-time and full-time employment among its female employees.

The Secretary sees no reason for treating disabilities relating to pregnancy differently from other temporary disabilities in the context of educational institutions. Accordingly, § 86.47(b) reflects the more detailed Title VII regulation rather than the Executive Order regulation. Section 86.47(c) also follows the Title VII regulation in requiring not only that disabilities related to pregnancy must be considered a justification for leave, but that where an employer provides for temporary disabilities under its fringe benefit or leave plan, disabilities related to pregnancy must be treated in the same manner as any other temporary disabilities.

Section 86.47(d) provides that an employee may not be required to commence leave related to pregnancy so long as her physician certifies that she is capable of performing her duties, and that she must be allowed to resume work after such a leave no more than two weeks after her physician certifies that she is capable of doing so, or in the case of an employee who is a teacher, at the beginning of the first academic term after such certification is made. These rules are consistent with the recent holding of the Supreme Court in Cleveland Board of Education v. LaFleur, 94 S.Ct. 791 (1974).

Although LaFleur apparently permits an employer to require that every pregnant teacher commence leave "at some firm date during the last few weeks of pregnancy," *Id.* at 799, n. 13, there is no clear medical evidence as to what such date might be generally appropriate, and the Secretary believes individualized determinations based on the employee's own capacities should be required instead.

Section 86.50(a) departs from both the Title VII and the Executive Order regulations in prohibiting pre-employment inquiries as to an applicant's marital status, as such inquiries are frequently the predicate for discrimination against married women. Section 86.21(c)(4) contains a similar prohibition with regard to pre-admission inquiries. Section 86.51 follows the Title VII and Executive Order regulations in providing for consideration of sex in making employment decisions where sex is a "bona fide occupational qualification." (The Title VII exemption is provided for by the statute; the Executive Order exemption is intended simply to be consistent with that legislation.) Section 86.51 is included only for consistency with these regulations.

Subpart F. As noted above, Subpart F sets forth the procedures which would govern implementation of the proposed regulations. These procedures are in most respects similar to those contained in the Department's regulation implementing Title VI of the Civil Rights Act of 1964, 45 CFR Parts 80 and 81. Several of the provisions, however, are particularly noteworthy.

The provision for amicus participation under Title VI is contained in the procedural rather than the substantive regulation and may be found at 45 CFR 81.23. Amicus participation under Title IX will be included when procedural regulations are issued.

The Office for Civil Rights has previously distributed a Memorandum to Presidents of Institutions of Higher Education Participating in Federal Assistance Programs (August 1973), a Memorandum for Directors of Institutions of Vocational Education Participating in Federal Assistance Programs (May 1973), and a Memorandum for Chief State School Officers and Local School Superintendents (February 1973), all of which describe the basic applicability of Title IX, and the Office for Civil Rights and the Office of Education have jointly distributed a Memorandum for Presidents of Selected Institutions of Higher Education Participating in Federal Assistance Programs (May 1973), which describes the criteria and procedures under which certain formerly single-sex institutions may operate pursuant to a plan for transition to nondiscriminatory admissions. These documents are consistent, with certain minor exceptions, with the provisions of proposed Part 86 (the requirements of Part 86 which correspond to those of the Memorandum for Presidents of Selected Institutions are contained in §§ 86.15 and 86.16).

Persons who wish to submit comments, suggestions, or objections pertaining to these regulations may present their views, in writing, to the Director of the Office of Civil Rights of the Department of Health, Education, and Welfare, P.O. Box 2974, Washington, D.C. 20013. The Secretary believes that the comment period should extend for at least thirty days into the autumn academic semester to enable academic institutions and student and faculty groups to formulate comments, and comments may therefore be submitted through October 15, 1974. Comments received in response to this notice will be available for public inspection in Room 3256, 330 Independence Avenue, SW., Washington, D.C. 20201, between 9 a.m. and 5:30 p.m., Monday through Friday (except Federal holidays) both before and after October 15, 1974, until the regulation is published in final form. Copies of representative comments received by the Director will also be made available for public inspection in the office of each Regional Director of the Office for Civil Rights during normal business hours before and after October 15, 1974. The Regional Directors and their offices are located as follows:

Region I—Mr. John G. Bynoe, RKO General Bldg., 5th Floor, Bulfinch Place, Boston, Massachusetts 02114.

Region II—Mr. Joel Barkan, 26 Federal Plaza, Rm. 3908, New York, New York 10007.

Region III—Mr. Dewey Dodds, Gateway Bldg., 3535 Market Street, Philadelphia, Pennsylvania 19101.

Region IV—Mr. William Thomas, 50 Seventh Street, NE., Rm. 404, Atlanta, Georgia 30323.

Region V—Mr. Kenneth A. Mines, [illegible] W. Jackson Blvd., 10th Floor, Chicago, Illinois 60606.

Region VI—Ms. Dorothy D. [illegible] Commerce Street, Dallas, Texas [illegible]

Region VII—Mr. Taylor D. [illegible] 12 Grand Bldg., 12th and Grand [illegible] Kansas City, Missouri 64106.

Region VIII—Mr. Gilbert D. Roman, Rm. 11037 Federal Bldg., 1961 Stout Street, Denver, Colorado 80202.

Region IX—Mr. Floyd L. Pierce, 760 Market Street, Rm. 700, San Francisco, California 94102.

Region X—Ms. Marialine K[illegible] Arcade Plaza Bldg., 1321 Second Avenue, Seattle, Washington 98101.

Comments received before October 15, 1974, will be considered before final action is taken on this proposal. Comments received after that date will be considered until the regulation is prepared in final form. The proposal may be changed in the light of the comments received. In the next several weeks, the Department will hold public forums in various cities to brief the public and media and to enter into a question and answer dialogue with the public about the proposed regulation. It is hoped that these forums will increase public awareness of the issues and assist interested citizens in developing formal comments to be later submitted to the Department.

This Part 86 is proposed under the authority of section 902 of the Education Amendments of 1972 (20 U.S.C. 1682).

In consideration of the foregoing, it is proposed to add Part 86 to Title 45 of the Code of Federal Regulations to read as set forth below.

Dated: June 14, 1974.

CASPAR W. WEINBERGER,
Secretary, Department of Health, Education, and Welfare.

PART 86—NONDISCRIMINATION ON THE BASIS OF SEX UNDER FEDERALLY ASSISTED EDUCATION PROGRAMS AND ACTIVITIES

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AUTHORITY: Section 902 of the Education Amendments of 1972, 86 Stat. 374; 20 U.S.C. 1682.

Subpart A—Introduction

§ 86.1 Purpose.

The purpose of this part is to effectuate title IX of the Education Amendments of 1972 (except sections 904 and 906 of those Amendments) which is designed to eliminate (with certain exceptions) discrimination on the basis of sex in any education program or activity receiving Federal financial assistance.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.2 Definitions.

As used in this part, the term—

(a) "*Title IX*" means title IX of the Education Amendments of 1972, Pub. L. 92–318, 20 U.S.C. 1681 *et seq.*

(b) "*Department*" means the Department of Health, Education, and Welfare.

(c) "*Secretary*" means the Secretary of Health, Education, and Welfare.

(d) "*Director*" means the Director of the Office for Civil Rights of the Department.

(e) "*Reviewing Authority*" means that component of the Department delegated authority by the Secretary to appoint, and to review the decisions of, administrative law judges in cases arising under this part.

(f) "*Administrative law judge*" means a person appointed by the reviewing authority to preside over a hearing held under this part.

(g) "*Federal financial assistance*" means any of the following, when authorized or extended under a law administered by the Department:

(1) A grant or loan of Federal funds, including funds made available for:

(i) The acquisition, construction, renovation, restoration, or repair of a building or facility or any portion thereof; and

(ii) Scholarships, loans, grants, wages or other funds extended to any entity for payment to or on behalf of students admitted to that entity, or extended directly to such students for payment to that entity.

(2) A grant of Federal real or personal property or any interest therein, including surplus property, and the proceeds of the sale or transfer of such property, if the Federal share of the fair market value of the property is not, upon such sale or transfer, properly accounted for to the Federal Government.

(3) Provision of the services of Federal personnel.

(4) Sale or lease of Federal property or any interest therein at nominal consideration, or at consideration reduced for the purpose of assisting the recipient or in recognition of public interest to be served thereby, or permission to use Federal property or any interest therein without consideration.

(5) Any other contract, agreement, or arrangement which has as one of its purposes the provision of assistance to any education program or activity, except a contract of insurance or guaranty.

(h) "*Recipient*" means any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, any public or private agency, institution, or organization, or other entity, or any person, to whom Federal financial assistance is extended directly or through another recipient and which operates an education program or activity which receives or benefits from such assistance, including any subunit, successor, assignee, or transferee thereof.

(i) "*Applicant*" means one who submits an application, request, or plan required to be approved by a Department official, or by a recipient, as a condition to becoming a recipient.

(j) "*Educational institution*" means a local educational agency as defined by section 801(f) of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 881), a preschool, a private elementary or secondary school, or an applicant or recipient of the type defined by paragraph (k), (l), (m), or (n).

(k) "*Institution of graduate higher education*" means an institution which:

(1) Offers academic study beyond the bachelor of arts or bachelor of science degree, whether or not leading to a certificate of any higher degree in the liberal arts and sciences; or

(2) Awards any degree in a professional field beyond the first professional degree (regardless of whether the first professional degree in such field is awarded by an institution of undergraduate higher education or professional education); or

(3) Awards no degree and offers no further academic study, but operates ordinarily for the purpose of facilitating research by persons who have received the highest graduate degree in any field of study.

(l) "*Institution of undergraduate higher education*" means:

(1) An institution offering at least two but less than four years of college level study beyond the high school level, leading to a diploma or an associate degree, or wholly or principally creditable toward a baccalaureate degree; or

(2) An institution offering academic study leading to a baccalaureate degree; or

(3) an agency or body which certifies credentials or offers degrees, but which may or may not offer academic study.

(m) "*Institution of professional education*" means an institution (except an institution of undergraduate higher education) which offers a program of academic study that leads to a first professional degree in a field for which there is a national specialized accrediting agency recognized by the United States Commissioner of Education.

(n) "*Institution of vocational education*" means a school or institution (except an institution of professional or graduate or undergraduate higher education) which has as its primary purpose preparation of students to pursue a technical, skilled, or semi-skilled occupation or trade, or to pursue study in a technical field, whether or not the school or institution offers certificates, diplomas, or degrees and whether or not it offers full-time study.

(o) "*Administratively separate unit*" means a school, department or college of an educational institution (other than a local educational agency) admission to which is independent of admission to any other component of such institution.

(p) "*Admission*" means selection for part-time, full-time, special, associate, transfer, exchange, or any other enrollment, membership, or matriculation in or at an education program or activity operated by a recipient.

(q) "*Student*" means a person who has gained admission.

(r) "*Transition plan*" means a plan subject to the approval of the United States Commissioner of Education pursuant to section 901(a)(2) of the Education Amendments of 1972, under which an educational institution operates in making the transition from being an educational institution which admits only students of one sex to being one which admits students of both sexes without discrimination.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.3 Remedial and affirmative actions.

(a) *Remedial action.* A recipient which has previously discriminated against persons on the basis of sex in an education program or activity shall take such remedial action as is necessary to overcome the effects of such previous discrimination.

(b) *Affirmative action.* In the absence of prior discrimination on the basis of sex in an education program or activity, a recipient may take affirmative action to overcome the effects of conditions which resulted in limited participation therein by persons of a particular sex.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.4 Assurances required.

(a) *General.* Every application for Federal financial assistance for any education program or activity shall as condition of its approval contain or be accompanied by an assurance from the recipient, satisfactory to the Director, that each education program or activity operated by the recipient and to which this part applies will be operated in compliance with this part.

(b) *Duration of obligation.* (1) In the case of Federal financial assistance extended to provide real property or structures thereon, such assurance shall obligate the recipient or, in the case of a subsequent transfer, the transferee, for the period during which the real property or structures are used to provide an education program or activity.

(2) In the case of Federal financial assistance extended to provide personal property, such assurance shall obligate the recipient for the period during which it retains ownership or possession of the property.

(3) In all other cases such assurance shall obligate the recipient for the period during which Federal financial assistance is extended.

(c) *Form.* The Director will specify the form of the assurances required by paragraph (a) of this section and the extent to which such assurances will be required of the applicant's or recipient's subgrantees, contractors, subcontractors, transferees, or successors in interest.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.5 Transfers of property.

If a recipient sells or otherwise transfers property financed in whole or in part with Federal financial assistance to a transferee which operates any education program or activity, and the Federal share of the fair market value of the property is not upon such sale or transfer properly accounted for to the Federal Government, both the transferor and the transferee shall be deemed to be recipients, subject to the provisions of subpart B.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.6 Effect of other requirements.

(a) *Effect of other Federal provisions.* The obligations imposed by this part are independent of obligations not to discriminate on the basis of sex imposed by Executive Order 11246, as amended; sections 799A and 845 of the Public Health Service Act (42 U.S.C. 295h-9 and 298b-2); title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e *et seq.*); the Equal Pay Act (29 U.S.C. 206 and 206(d)); and any other Act of Congress or Federal regulation.

(Secs. 901, 902, 905, Education Amendments of 1972, 86 Stat. 373, 374, 375; 20 U.S.C. 1681, 1682, 1685)

(b) *Effect of State or local law or other requirements.* The obligation to comply with this part is not obviated or alleviated by any State or local law or other requirement which would render any applicant or student ineligible, or limit the eligibility of any applicant or student, on the basis of sex, to practice any occupation or profession.

(c) *Effect of rules or regulations of private organizations.* The obligation to comply with this part is not obviated or alleviated by any rule or regulation of any organization, club, athletic or other league, or association which would render any applicant or student ineligible to participate, or limit the eligibility or participation of any applicant or student, on the basis of sex, in any education program or activity operated by a recipient and which receives or benefits from Federal financial assistance.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.7 Effect of employment opportunities.

The obligation to comply with this part is not obviated or alleviated because employment opportunities in any occupation or profession are or may be more limited for members of one sex than for members of the other sex.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.8 Designation of responsible employee.

Each recipient shall designate an employee to coordinate its efforts to comply with this part, including any investigation of any complaint communicated to such recipient alleging its noncompliance with this part or alleging any actions which would be prohibited by this part.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.9 Dissemination of policy.

(a) *Notification of policy.* (1) Each recipient shall implement specific and continuing steps to notify applicants for admission or employment, students, employees, counselors of applicants for admission or employment, and other participants, beneficiaries, and other interested persons, that it does not discriminate on the basis of sex in the education programs or activities which it operates, and that it is required by title IX and this part not to discriminate in such manner. Such notification shall contain such information, and be made in such manner, as the Director finds necessary to apprise such persons of the protections against discrimination assured them by title IX and this part, but shall state at least that the requirement not to discriminate in education programs and activities extends to employment therein, and to admission thereto unless subpart C does not apply to the recipient, and that inquiries concerning the application of title IX and this part to such recipient may be referred to the employee designated pursuant to § 86.9, or to the Director.

(2) Each recipient shall make the initial notification required by paragraph (a)(1) within 90 days of the effective date of this part or of the date this part first applies to such recipient, whichever comes later, which notification shall include publication in: (i) local newspapers; (ii) newspapers and magazines operated by such recipient or by student, alumnae, or alumni groups for or in connection with such recipient; and (iii) memoranda or other written communications distributed to every student and employee of such recipient.

(b) *Publications.* (1) Each recipient shall prominently include a statement of the policy described in paragraph (a) of this section in each announcement, bulletin, catalog, or application form which it makes available to any person of a type described in paragraph (a) of this section, or which is otherwise used in connection with the recruitment of students or employees.

(2) A recipient shall not use or distribute a publication of the type described in this paragraph which suggests, by text or illustration, that such recipient treats applicants, students or employees differently on the basis of sex except as such treatment is permitted by this part.

(c) *Distribution.* Each recipient shall distribute without discrimination on the basis of sex each publication described in paragraph (b) of this section, and shall apprise each of its admission and employment recruitment representatives of the policy of nondiscrimination described in paragraph (a) of this section, and require such representatives to adhere to such policy.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

Subpart B—Coverage

§ 86.11 Application.

Except as provided in this subpart, this Part 86 applies to every recipient and to each education program or activity operated by such recipient which receives or benefits from Federal financial assistance.

§ 86.12 Educational institutions controlled by religious organizations.

(a) *Application.* This part does not apply to an educational institution which is controlled by a religious organization to the extent application of this part would not be consistent with the religious tenets of such organization.

(b) *Exemption.* An educational institution which wishes to claim the exemption set forth in paragraph (a) of this section, shall do so in writing to the Director when filing the assurance required by § 86.4, setting forth the extent of the requested exemption and enclosing a statement of the religious tenets under which the exemption is claimed and any other information which might aid the Director in determining whether the institution qualifies for such exemption.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.13 Military and merchant marine educational institutions.

This part does not apply to an educational institution whose primary purpose is the training of individuals for a military service of the United States or for the merchant marine.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.14 Admissions.

(a) *Administratively separate units.* For the purposes only of this section, §§ 86.15 and 86.16, and subpart C, each administratively separate unit shall be deemed to be an educational institution.

(b) *Application of subpart C.* Except as provided in paragraphs (c) and (d) of this section, subpart C applies to each recipient. A recipient to which subpart C applies shall not discriminate on the basis of sex in admission or recruitment in violation of that subpart.

(c) *Educational institutions.* Except as provided in paragraph (d) of this section as to recipients which are educational institutions, subpart C applies only to institutions of vocational education, professional education, graduate higher education, and public institutions of undergraduate higher education.

(d) *Public institutions of undergraduate higher education.* Subpart C does not apply to any public institution of undergraduate higher education which traditionally and continually from its establishment has had a policy of admitting only students of one sex.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.15 Educational institutions eligible to submit transition plans.

(a) *Application.* This section applies to each educational institution to which subpart C applies which:

(1) Admitted only students of one sex as regular students as of June 23, 1972; or

(2) Admitted only students of one sex as regular students as of June 23, 1965, but thereafter admitted as regular students, students of the sex not admitted prior to June 23, 1965.

(b) *Provision for transition plans.* An educational institution to which this section applies shall not discriminate on the basis of sex in admission or recruitment in violation of subpart C unless it is carrying out a transition plan approved by the United States Commissioner of Education as described in § 86.16, which plan provides for the elimination of such discrimination by the earliest practicable date but in no event later than June 23, 1979.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.16 Transition plans.

(a) *Submission of plans.* An institution to which § 86.15 applies and which is composed of more than one administratively separate unit may submit either a single transition plan applicable to all such units, or a separate transition plan applicable to each such unit.

(b) *Content of plans.* In order to be approved by the United States Commissioner of Education, a transition plan shall:

(1) State the name, address, and Federal Interagency Committee on Education (FICE) Code of the educational institution submitting such plan, the administratively separate units to which the plan is applicable, and the name, address, and telephone number of the person to whom questions concerning the plan may be addressed. The person who submits the plan shall be the chief administrator or president of the institution, or another individual legally authorized to bind the institution to all actions set forth in the plan.

(2) State whether the educational institution or administratively separate unit admits students of both sexes, as regular students, and if so, when it began to do so.

(3) Identify and describe with respect to the educational institution or administratively separate unit any obstacles to admitting students without discrimination on the basis of sex.

(4) Describe in detail the steps necessary to eliminate as soon as practicable each obstacle so identified and indicate the schedule for taking these steps and the individual directly responsible for their implementation.

(5) Include estimates of the number of students, by sex, expected to apply for, be admitted to, and enter each class during the period covered by the plan.

(c) *Nondiscrimination.* No policy or practice of a recipient to which § 86.15 applies shall result in treatment of applicants to or students of such recipient in violation of subpart C unless such treatment is necessitated by an obstacle identified in paragraph (b)(3) of this section and a schedule for eliminating that obstacle has been provided as required by paragraph (b)(4) of this section.

(d) *Effects of past exclusion.* To overcome the effects of past exclusion of students on the basis of sex, each educational institution to which § 86.15 applies shall include in its transition plan, and shall implement, specific steps designed to encourage individuals of the previously excluded sex to apply for admission to such institution. Such steps shall include instituting recruitment programs which emphasize the institution's commitment to enrolling students of the sex previously excluded.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§§ 86.17–86.20 [Reserved]

Subpart C—Discrimination on the Basis of Sex in Admission and Recruitment Prohibited

§ 86.21 Admission.

(a) *General.* No person shall, on the basis of sex, be denied admission, or be subjected to discrimination in admission, by any recipient to which this subpart applies, except as provided in §§ 86.15 and 86.16.

(b) *Specific prohibitions.* (1) In determining whether a person satisfies any policy or criterion for admission, or in making any offer of admission, a recipient to which this subpart applies shall not:

(i) give preference to one person over another on the basis of sex, by ranking applicants separately on such basis, or otherwise;

(ii) apply numerical limitations upon the number or proportion of persons of either sex who may be admitted; or

(iii) otherwise treat one individual differently from another on the basis of sex.

(2) A recipient shall not administer or operate any test or other criterion for admission which adversely affects any person on the basis of sex unless use of such test or criterion is shown to predict validly successful completion of the education program or activity in question.

(c) *Prohibitions relating to marital or parental status.* In determining whether a person satisfies any policy or criterion for admission, or in making any offer of admission, a recipient to which this subpart applies:

(1) shall not apply any rule concerning the actual or potential parental, family, or marital status of a student or applicant which treats persons differently on the basis of sex;

(2) shall not discriminate against or exclude any person on the basis of preg-

nancy, childbirth, miscarriage, abortion, or recovery therefrom, or establish or follow any rule or practice which so discriminates or excludes;

(3) shall treat disabilities related to pregnancy, childbirth, miscarriage, abortion, or recovery therefrom in the same manner and under the same policies as any other temporary disability or physical condition; and

(4) shall not make pre-admission inquiry as to the martial status of an applicant for admission, including whether such applicant is "Ms.," "Miss," or "Mrs." A recipient may make pre-admission inquiry as to the sex of an applicant for admission, but only if such inquiry is made equally of such applicants of both sexes and if the results of such inquiry are not used in connection with discrimination prohibited by this part.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.22 Preference in admission.

A recipient to which this subpart applies shall not give preference to applicants for admission, on the basis of attendance at any educational institution or other school or entity which admits as students only or predominantly members of one sex, if the giving of such preference has the effect of discriminating on the basis of sex in violation of this subpart.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.23 Recruitment.

(a) *Comparable recruitment.* A recipient to which this subpart applies shall make comparable efforts to recruit members of each sex, except that such recipient may be required to undertake additional recruitment efforts as remedial action pursuant to § 86.3(a), and may choose to undertake such efforts as affirmative action pursuant to § 86.3(b).

(b) *Recruitment at certain institutions.* A recipient to which this subpart applies shall not recruit primarily or exclusively at educational institutions, schools or entities which admit as students only or predominantly members of one sex, if such actions have the effect of discriminating on the basis of sex in violation of this subpart.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§§ 86.24–86.30 [Reserved].

Subpart D—Discrimination on the Basis of Sex in Education Programs and Activities Prohibited

§ 86.31 Education programs and activities.

(a) *General.* Except as provided elsewhere in this part, no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any academic, extracurricular, research, occupational training, or other education program or activity operated by a recipient which receives or benefits from Federal financial assistance. This subpart does not apply to actions of a recipient in connection with admission of its students to an education program or activity of (1) a recipient to which subpart C does not apply, or (2) an entity, not a recipient, to which subpart C would not apply if the entity were a recipient.

(b) *Specific prohibitions.* Except as provided in this subpart, in providing any aid, benefit, or service to a student a recipient shall not, on the basis of sex:

(1) Treat one person differently from another in determining whether such person satisfies any requirement or condition for the provision of such aid, benefit, or service;

(2) Provide different aid, benefits, or services or provide aid, benefits, or services in a different manner;

(3) Deny any person any such aid, benefit, or service;

(4) Subject any person to separate or different rules of behavior or other treatment;

(5) Discriminate against any person in the application of any rules of appearance;

(6) Apply any rule concerning the domicile or residence of a student or applicant;

(7) Aid or perpetuate discrimination against any person by assisting any agency, organization, or person which discriminates on the basis of sex in providing any aid, benefit or service to students or employees; or

(8) Otherwise limit any person in the enjoyment of any right, privilege, advantage, or opportunity.

(c) *Programs not operated by recipient.* (1) This paragraph applies to any recipient which requires participation by any applicant, student, or employee in any education program or activity not operated wholly by such recipient, or which facilitates, permits, or considers such participation as part of or equivalent to an education program or activity operated by such recipient, including participation in educational consortia and cooperative employment and student-teaching assignments.

(2) Such recipient:

(i) Shall develop and implement a procedure designed to ensure that the operator or sponsor of such other education program or activity takes no action affecting any applicant, student, or employee of such recipient which this part would prohibit such recipient from taking; and

(ii) Shall not facilitate, require, permit, or consider such participation if such action occurs.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.32 Housing.

(a) *Generally.* A recipient shall not, on the basis of sex, apply different rules or regulations, impose different fees or requirements, or offer different services or benefits related to housing, except as provided in this section (including housing provided only to married students).

(b) *Housing provided by recipient.*

(1) A recipient may provide separate housing on the basis of sex.

(2) Housing provided by a recipient to students of one sex, when compared to that provided to students of the other sex, shall be as a whole:

(i) Proportionate in quantity to the number of students of that sex applying for such housing; and

(ii) Comparable in quality and cost to the student.

(c) *Other housing.* (1) A recipient shall not, on the basis of sex, administer different policies or practices concerning occupancy by its students of housing other than provided by such recipient.

(2) A recipient which, through solicitation, listing, approval of housing, or otherwise, assists any agency, organization, or person in making housing available to any of its students, shall take such action as may be necessary to ensure that such housing as is provided to students of one sex, when compared to that provided to students of the other sex, is as a whole (i) proportionate in quantity and (ii) comparable in quality and cost to the student. A recipient may render such assistance to any agency, organization, or person which provides all or part of such housing to students only of one sex.

(Secs. 901, 902, 907, Education Amendments of 1972, 86 Stat. 373, 374, 375; 20 U.S.C. 1681, 1682, 1686)

§ 86.33 Comparable facilities.

A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374)

§ 86.34 Access to education program or activity.

(a) *Course offerings.* A recipient shall not provide any course or otherwise carry out any of its education program or activity separately on the basis of sex, or require or refuse participation therein by any of its students on such basis, including health, physical education, industrial, business, vocational, technical, home economics, music and adult education courses.

(b) *Local educational agencies.* A recipient which is a local educational agency shall not, on the basis of sex, exclude any person from admission to:

(1) any institution of vocational education operated by such recipient; or

(2) any other school or educational unit operated by such recipient, unless such recipient otherwise makes available to such person, pursuant to the same policies and criteria of admission, courses, services, and facilities comparable to each course, service and facility offered in or through such schools.

(c) *Appraisal and counseling materials.* A recipient which uses testing or other materials for appraising or counseling students shall not use different materials for different students on the basis of their sex or use materials which permit or require different treatment of students on such basis.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

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§ 86.35 Financial and employment assistance to students.

(a) *Provision of financial assistance.* (1) In providing financial assistance to any of its students a recipient shall not:

(i) On the basis of sex provide different amounts or types of such assistance, limit eligibility for such assistance which is of any particular type or source, apply different criteria, or otherwise discriminate; or

(ii) through solicitation, listing, approval, provision of facilities, or other services assist any foundation, trust, agency, organization, or person which provides assistance to any of such recipient's students in a manner which discriminates on the basis of sex.

(2) This paragraph does not apply to assistance by a recipient in the administration of a scholarship, fellowship, or other financial assistance program which discriminates on the basis of sex and is established under a foreign will, trust, bequest, or similar legal instrument, or by a foreign government.

(b) *Assistance in making available employment.* A recipient which assists any agency, organization, or person in making employment available to any of its students:

(1) shall take such action as may be necessary to assure that such employment is made available without discrimination on the basis of sex; and

(2) shall not render such services to any agency, organization, or person which discriminates on the basis of sex in so making available such employment.

(c) *Employment of students.* A recipient which employs any of its students shall not do so in a manner which violates subpart E.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

(d) *Assistance related to athletics.* Notwithstanding the provisions of this section, separate financial assistance for members of each sex may be provided as part of separate athletic teams for members of each sex to the extent consistent with § 86.38.

§ 86.36 Health and insurance benefits and services.

In providing a medical, hospital, accident, or life insurance benefit, service, policy, or plan to any of its students, a recipient shall not discriminate on the basis of sex, or provide such benefit, service, policy, or plan in a manner which would violate subpart E if it were provided to employees of the recipient. This section shall not prohibit a recipient from providing any benefit or service which may be used by a different proportion of students of one sex than of the other, including family planning services.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.37 Marital or parental status.

(a) *Status generally.* A recipient shall not apply any rule concerning a student's actual or potential parental, family, or marital status which treats students differently on the basis of sex.

(b) *Pregnancy and related conditions.* (1) A recipient shall not discriminate against any student, or exclude any student from its education program or activity, including any class or extra-curricular activity, on the basis of such student's pregnancy, childbirth, false pregnancy, miscarriage, abortion, or recovery therefrom, unless:

(i) The student requests voluntarily to participate in a different such program or activity; or

(ii) The student's physician certifies to the recipient that such different participation is necessary for her physical, mental, or emotional well-being.

(2) A recipient shall treat disabilities related to pregnancy, childbirth, false pregnancy, miscarriage, abortion, or recovery therefrom in the same manner and under the same policies as any temporary disability in any medical or hospital benefit, service, plan, or policy which such recipient administers, operates, offers, or participates in with regard to students admitted to the entity.

(3) In the case of a recipient which does not maintain a temporary disability policy for its students, or in the case of a student who does not otherwise qualify for leave under such a policy, a recipient shall treat pregnancy as a justification for a leave of absence for a reasonable period of time, the conclusion of which the student shall be reinstated to her original status.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.38 Athletics.

(a) *General.* No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any physical education or athletic program operated by a recipient, and no recipient shall provide any physical education or athletic program separately on such basis; provided, however, that a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill.

(b) *Determination of student interest.* A recipient which operates or sponsors athletics shall determine at least annually, using a method to be selected by the recipient which is acceptable to the Director, in what sports members of each sex would desire to compete.

(c) *Affirmative efforts.* A recipient which operates or sponsors athletic activities shall, with regard to members of a sex for which athletic opportunities previously have been limited, make affirmative efforts to:

(1) Inform members of such sex of the availability for them of athletic opportunities equal to those available for members of the other sex and of the nature of those opportunities, and

(2) Provide support and training activities for members of such sex designed to improve and expand their capabilities and interests to participate in such opportunities.

(d) *Equal opportunity.* A recipient which operates or sponsors athletics shall make affirmative efforts to provide athletic opportunities in such sports and through such teams as will most effectively equalize such opportunities for members of both sexes, taking into consideration the determination made pursuant to paragraph (b) of this section.

(e) *Separate teams.* A recipient which operates or sponsors separate teams for members of each sex shall not discriminate on the basis of sex therein in the provision of necessary equipment or supplies for each team, or in any other manner.

(f) *Expenditures.* Nothing in this section shall be interpreted to require equal aggregate expenditures for athletics for members of each sex.

§§ 86.39–86.40 [Reserved]

Subpart E—Discrimination on the Basis of Sex in Employment in Education Programs and Activities Prohibited

§ 86.41 Employment.

(a) *General.* (1) No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination in employment, or recruitment, consideration, or selection therefor, whether full-time or part-time, under any education program or activity operated by a recipient which receives or benefits from Federal financial assistance.

(2) A recipient shall make all employment decisions in any education program or activity operated by such recipient in a manner which furthers equal employment opportunity regardless of sex and shall not limit, segregate, or classify applicants or employees in any way which could adversely affect any applicant's or employee's employment opportunities or status because of sex.

(3) A recipient shall not enter into any contractual or other relationship which directly or indirectly has the effect of subjecting individuals to discrimination prohibited by this subpart, including relationships with employment and referral agencies, with labor unions, and with organizations providing or administering fringe benefits to employees of the recipient.

(b) *Application.* The provisions of this subpart apply to:

(1) Recruitment, advertising, and the process of application for employment;

(2) Hiring, upgrading, promotion, consideration for and award of tenure, demotion, transfer, layoff, termination, right of return from layoff, and rehiring;

(3) Rates of pay or any other form of compensation, and changes in compensation;

(4) Job assignments, classifications and structure, including position descriptions, lines of progression, and seniority lists;

(5) The terms of any collective bargaining agreement;

(6) Granting and return from leaves of absence, pregnancy leave, leave for persons of either sex to care for children or dependents, or any other leave

(7) Fringe benefits available by virtue of employment, whether or not administered by the recipient;

(8) Selection and financial support for training, including apprenticeship, professional meetings, conferences, and other related activities, selection for tuition assistance, selection for sabbaticals and leaves of absence to pursue training;

(9) Employer-sponsored activities, including social or recreational programs; and

(10) Any other term, condition, or privilege of employment.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374: 20 U.S.C. 1681, 1682)

§ 86.42 Employment criteria.

A recipient shall not administer or operate any test or other criterion for any employment opportunity which adversely affects any person on the basis of sex unless:

(a) Use of such test or other criterion is shown to predict validly successful performance in the position in question; and

(b) Alternative tests or criteria for such purpose, which do not have such adverse effect, are shown to be unavailable.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.43 Recruitment.

(a) *Comparable and affirmative recruiting.* If a recipient recruits applicants for employment, either generally or for particular positions, it shall make comparable efforts to recruit members of each sex in all such recruiting, except that a recipient shall make such affirmative attempts to recruit members of a sex which previously had limited employment participation as are necessary to overcome the effects of such limited participation.

(b) *Recruitment patterns.* A recipient shall not recruit primarily or exclusively at entities which furnish as applicants only or predominantly members of one sex if such actions have the effect of discriminating on the basis of sex in violation of this subpart.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.44 Compensation.

A recipient shall not make or enforce any policy or practice which, on the basis of sex:

(a) Makes distinctions in rates of pay or other compensation;

(b) Requires any person to perform duties for which compensation is lower than that for performance in a different position:

(1) Entailing similar duties or,

(2) The position description for which is limited to similar duties; or

(c) Makes any person subject to a position description under which compensation is lower than that for performance:

(1) Under a different position description which is limited to similar duties, or

(2) In a different position entailing duties similar to those set forth in such position description.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.45 Job classification and structure.

A recipient shall not:

(a) Classify a job as being for males or for females;

(b) Maintain or establish separate lines of progression, seniority lists, career ladders, or tenure systems based on sex; or

(c) Maintain or establish separate lines of progression, seniority systems, career ladders, or tenure systems for similar jobs, position descriptions, or job requirements which operate to classify persons on the basis of sex, unless sex is a bona-fide occupational qualification for the positions in question as set forth in § 86.51.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.46 Fringe benefits.

(a) *"Fringe benefits" defined.* For purposes of this part, "fringe benefits" means any medical, hospital, accident, life insurance or retirement benefit, service, policy or plan, any profit-sharing or bonus plan, leave, and any other benefit or service of employment not subject to the provisions of § 86.44.

(b) *Prohibitions.* A recipient shall not:

(1) discriminate on the basis of sex with regard to making fringe benefits available to employees or make fringe benefits available to spouses, families, or dependents of employees differently upon the basis of the employee's sex;

(2) Administer, operate, offer, or participate in a fringe benefit plan which does not provide either for equal periodic benefits for members of each sex, or for equal contributions to the plan by such recipient for members of each sex; and

(3) administer, operate, offer, or participate in a pension or retirement plan which establishes different optional or compulsory retirement ages based on sex or which otherwise discriminates in benefits on the basis of sex.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.47 Marital or parental status.

(a) *General.* A recipient shall not apply any policy or take any employment action:

(1) concerning the potential marital, parental, or family status of an employee or applicant for employment which treats persons differently on the basis of sex; or

(2) which is based upon whether an employee or applicant for employment is the head of household or principal wage earner in such employee's or applicant's family unit.

(b) *Pregnancy.* A recipient shall not discriminate against or exclude from employment any employee or applicant for employment on the basis of pregnancy, or establish or follow any policy or practice which so discriminates or excludes. For the purpose of this subpart, "pregnancy" means the entire process of pregnancy, childbirth, and recovery therefrom, and includes false pregnancy, miscarriage, and abortion.

(c) *Pregnancy as a temporary disability.* A recipient shall treat disabilities caused or contributed to by pregnancy as temporary disabilities for all job-related purposes, including commencement, duration and extensions of leave, payment of disability income, accrual of seniority and any other benefit or service, and reinstatement, and under any fringe benefit offered to employees by virtue of employment.

(d) *Pregnancy leave.* In the case of a recipient which does not maintain a temporary disability policy for its employees, or in the case of an employee with insufficient leave or accrued employment time to qualify for leave under such a policy, a recipient shall treat pregnancy as a justification for a leave of absence without pay for a reasonable period of time, at the conclusion of which the employee shall be reinstated to her original job or to a comparable position, without decrease in rate of compensation or loss of promotional opportunities, or any other right or privilege of employment.

(e) *Inception of and return from pregnancy leave.* In complying with this section, a recipient shall not require any employee to:

(1) Begin leave related to pregnancy so long as the employee's physician certifies in writing that she is physically capable of performing her duties provided that a pregnant employee shall notify her employer in writing of her expected date of delivery at least 120 days prior to such date; or

(2) Return to her employment after a leave related to pregnancy later than two weeks after the employee's physician certifies in writing that she is physically capable of performing her duties or in the case of any employee in a teaching position, later than the beginning of the first full academic term commencing after such certification is made.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.48 Effect of State or local law or other requirements.

(a) *Prohibitory requirements.* The obligation to comply with this subpart is not obviated or alleviated by the existence of any State or local law or other requirement which imposes prohibitions or limits upon employment of members of one sex which are not imposed upon members of the other sex.

(b) *Benefits.* A recipient which provides any compensation, service or benefit to members of one sex pursuant to a State or local law or other requirement shall provide the same compensation, service, or benefit to members of the other sex.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.49 Advertising.

A recipient shall not in any advertising related to employment indicate preference, limitation, specification, or discrimination based on sex unless sex is a bona-fide occupational qualification for the particular job in question.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.50 Pre-employment inquiries.

(a) *Marital status.* A recipient shall not make pre-employment inquiry as to the marital status of an applicant for employment, including whether such applicant is "Ms., Miss, or Mrs."

(b) *Sex.* A recipient may make pre-employment inquiry as to the sex of an applicant for employment, but only if such inquiry is made equally of such applicants of both sexes and if the results of such inquiry are not used in connection with discrimination prohibited by this part.

§ 86.51 Sex as a bona-fide occupational qualification.

A recipient may take action otherwise prohibited by this subpart provided it is shown that sex is a bona-fide occupational qualification for that action, such that consideration of sex with regard to such action is essential to successful operation of the employment function concerned. A recipient shall not take action pursuant to this section which is based upon alleged comparative employment characteristics or stereotyped characterizations of one or the other sex, or upon preference based on sex of the recipient, employees, students, or other persons, but nothing contained in this section shall prevent a recipient from considering an employee's sex in relation to employment in a locker room, or toilet facility used only by members of one sex.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§§ 86.52–86.60 [Reserved]

Subpart F—Procedures

§ 86.61 Compliance information.

(a) *Cooperation and assistance.* The Director will to the fullest extent practicable seek the cooperation of recipients in obtaining compliance with this part and will provide assistance and guidance to recipients to help them comply voluntarily with this part.

(b) *Compliance reports.* Each recipient shall keep such records and submit to the Director timely, complete and accurate compliance reports at such times, and in such form and containing such information, as the Director may determine to be necessary to enable him or her to ascertain whether the recipient has complied or is complying with this part. For example, recipients shall have available for the Department data showing the extent to which members of the different sexes are students, employees or other beneficiaries of or participants in federally-assisted education programs and activities. In the case of any such program or activity under which one recipient extends Federal financial assistance to any other recipient, such other recipient shall also submit such compliance reports to the primary recipient as may be necessary to enable the primary recipient to carry out its obligations under this part.

(c) *Access to sources of information.* Each recipient shall permit access by the Director during normal business hours to such of its books, records, accounts, and other sources of information, and its facilities, and shall permit the Director to make copies of any such written information, as may be pertinent to ascertain compliance with this part. Where any informaiton required of a recipient is in the exclusive possession of any other agency, institution or person and such agency, institution or person fails or refuses to furnish such information the recipient shall so certify in its report and shall set forth what efforts it has made to obtain the information. Asserted considerations of privacy or confidentiality may not operate to bar the Department from evaluating or seeking to enforce compliance with this part. Information of a confidential nature obtained in connection with compliance evaluation or enforcement will not be disclosed by the Department except where necessary in formal enforcement proceedings or where otherwise required by law.

(Sec. 902, Education Amendments of 1972, 86 Stat. 374; 20 U.S.C. 1682)

§ 86.62 Conduct of investigations.

(a) *Periodic compliance reviews.* The Director will from time to time review the practices of recipients to determine whether they are complying with this part.

(b) *Complaints.* Any person who believes himself or herself or any specific class of individuals to be subjected to discrimination prohibited by this part may be himself or herself or by a representative file with the Director a written complaint. A complaint must be filed not later than 180 days from the date of the alleged discrimination, unless the time for filing is extended by the Director, or unless the alleged discrimination took place after June 30, 1972, but prior to the effective date of this part. The Director shall notify each complainant promptly, in writing, that the complaint has been received.

(c) *Investigations.* The Director will make a prompt investigation whenever a compliance review, report, complaint, or any other information indicates a possible failure to comply with this part. The investigation will include, where appropriate, a review of the pertinent practices and policies of the recipient, the circumstances under which the possible noncompliance with this part occurred, and other factors relevant to a determination as to whether the recipient has failed to comply with this part.

(d) *Resolution of matters.* (1) If an investigation pursuant to paragraph (c) of this section indicates a failure to comply with this part, the Director will so inform the recipient and the complainant, if any, and the matter will be resolved by informal means whenever possible. If it has been determined that the matter cannot be resolved by informal means, action will be taken as provided for in § 86.63.

(2) If, after an investigation pursuant to paragraph (c) of this section, it appears that action pursuant to paragraph (d)(1) of this section is not warranted, the Director will so inform each complainant, in writing, and will give each complainant the opportunity to submit additional information, orally or in writing. Such information will be reviewed promptly and the Director will notify the complainant, in writing, of what action appears to be warranted in light of the information.

(3) If after an investigation pursuant to paragraph (c) of this section or after action required by paragraph (d)(2) of this section, it appears that action pursuant to paragraph (d)(1) of this section is not warranted, the Director will so inform the recipient and each complainant, in writing.

(e) *Intimidatory or retaliatory acts prohibited.* Each recipient shall permit the Director to interview any of its students or employees without a representative of such recipient being present. No recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by section 901 of the Education Amendments of 1972 or this part, or because he or she has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this part. The identity of complainants will be kept confidential by the Department except to the extent necessary to carry out the purposes of this part, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder, or where otherwise required by law.

(Sec. 902, Education Amendments of 1972, 86 Stat. 374; 20 U.S.C. 1682)

§ 86.63 Procedure for effecting compliance.

(a) *General.* If there appears to be a failure or threatened failure to comply with this part, and if the noncompliance or threatened noncompliance cannot be corrected by informal means, compliance with this part may be effected by the suspension or termination of or refusal to award or continue Federal financial assistance in accordance with the procedures of paragraph (c) of this section or by any other means authorized by law. Such other means may include but are not limited to, (1) a referral to the Department of Justice with a recommendation that appropriate proceedings be brought to enforce any rights of the United States under any law of the United States, or any assurance or other contractual undertaking, and (2) any applicable proceeding under State or local law.

(b) *Noncompliance with § 86.4.* If an applicant or recipient fails or refuses to furnish an assurance required under § 86.4 or otherwise fails or refuses to comply with a requirement imposed by or pursuant to that section, Federal financial assistance may be refused in accordance with the procedures of paragraph (c) of this section. The Department will not be required to provide assistance in such a case during the pendency of the administrative proceedings under such paragraph except that the Department will continue assistance during the pendency of such proceedings where such assistance is due and payable pursuant to an application therefor approved prior to the effective date of this part.

(c) *Termination of or refusal to grant or to continue Federal financial assistance.* No order suspending, terminating or refusing to award or continue Federal financial assistance will become effective until (1) the Director has advised the applicant or recipient of its failure to comply and has determined that compliance cannot be secured by voluntary means, (2) there has been a finding on the record, after opportunity for hearing, of a failure by the applicant or recipient to comply with a requirement imposed by or pursuant to this part, and (3) 30 days have expired after the Secretary has filed with the committee of the House and the committee of the Senate having legislative jurisdiction over the program involved, a full written report of the circumstances and the grounds for such action. Any action to suspend or terminate or to refuse to award or continue Federal financial assistance shall be limited to the particular political entity, or part thereof, or other applicant or recipient as to whom such a finding has been made and shall be limited in its effect to the particular education program or activity or part thereof in which such noncompliance has been so found.

(d) *Other means authorized by law.* No action to effect compliance by any other means authorized by law will be taken until (1) the Director has determined that compliance cannot be secured by voluntary means, (2) the recipient or other person and the complainant, if any, has been notified of the recipient's failure to comply and of the action to be taken to effect compliance, and (3) the expiration of at least 10 days from the mailing of such notice to the recipient or other person. During this period of at least 10 days additional efforts will be made to persuade the recipient or other person to comply with this part and to take such corre[illegible] as may be appropriate.

(Sec. 902, [illegible] Amendments of 1972, 86 Stat. 374; 20 U[illegible])

§ 86.64 Hearings.

(a) *Opportunity for hearing.* Whenever an opportunity for a hearing is required by § 86.63(c), reasonable notice will be given by registered or certified mail, return receipt requested, to each affected applicant or recipient. This notice will advise such applicant or recipient of the action proposed to be taken, the specific provision under which the proposed action against it is to be taken, and the matters of fact or law asserted as the basis for this action, and either (1) fix a date not less than 20 days after the date of such notice within which the applicant or recipient may request, by certified or registered mail addressed to the Director, that the matter be scheduled for hearing or (2) advise such applicant or recipient that the matter in question has been set down for hearing at a stated place and time. The time and place so fixed will be subject to change for cause. A copy of this notice will be mailed by certified mail, return receipt requested, to each individual complainant, and to each organization or group which has filed a complaint on behalf of one or more individuals pursuant to § 86.62(b), and each such complainant, organization, or group will be advised of the time and place of the hearing. An applicant or recipient may waive a hearing and submit written information and argument for the record. The failure of an applicant or recipient to request a hearing for which a date has been set shall be deemed to be a waiver of the right to a hearing under section 902 of the Education Amendments of 1972 and § 86.63(c) of this regulation and consent to the making of a decision on the basis of such information as may be filed as the record.

(b) *Time and place of hearing.* Hearings will be held before an administrative law judge designated in accordance with 5 U.S.C. 3105 and 3344. Hearings will be held at the offices of the Department in Washington, D.C., at a time fixed by the Director unless the administrative law judge determines that the convenience of the applicant or recipient or of the Department requires that another place be selected.

(c) *Participation as amicus curiae.* Each individual complainant, and each organization or group which has filed a complaint on behalf of one or more individuals, may petition the administrative law judge for leave to participate as *amicus curiae*, by giving testimony, by filing a brief, or both, in a hearing held pursuant to paragraph (a) of this section in any matter concerning which such complainant, organization, or group, has filed a complaint pursuant to § 86.62(b). Such petition shall be made no more than 20 days after the date of the notice prescribed by paragraph (a) of this section. Leave to participate as *amicus curiae* shall be liberally granted.

(d) *Right to counsel.* In all proceedings under this section, the recipient shall have the right to be represented by counsel.

(e) *Procedures, evidence, and record.* (1) The hearing, decision, and any administrative review thereof shall be conducted in conformity with 5 U.S.C. 554-557 and in accordance with such rules of procedure as are proper (and not inconsistent with this section) relating to the conduct of the hearing, giving of notices subsequent to those provided for in paragraph (a) of this section, taking of testimony, exhibits, arguments and briefs, requests for findings, and other related matters. Both the Department and the recipient shall be entitled to introduce all relevant evidence on the issues as stated in the notice for hearing or as determined by the officer conducting the hearing at the outset of or during the hearing. Any person (other than a Government employee on official business) who, having been invited or requested to appear and testify as a witness on the Government's behalf, attends at a time and place scheduled for a hearing provided by this part, may be reimbursed for his or her travel and actual expenses of attendance in an amount not to exceed the amount payable under the standardized travel regulations to a Government employee traveling on official business.

(2) Technical rules of evidence shall not apply to hearings conducted pursuant to this part, but rules or principles designed to assure production of the most credible evidence available and to subject testimony to test by cross-examination shall be applied where reasonably necessary by the officer conducting the hearing. The hearing officer may exclude irrelevant, immaterial, or unduly repetitious evidence. All documents and other evidence offered or taken for the record shall be open to examination by the parties and opportunity shall be given to refute facts and arguments advanced on either side of the issues. A transcript shall be made of the oral evidence except to the extent the substance thereof is stipulated for the record. All decisions shall be based upon the hearing record and written findings shall be made.

(f) *Consolidated or joint hearings.* In cases in which the same or related facts are asserted to constitute noncompliance with this part with respect to two or more programs to which this part applies, or noncompliance with this part and the regulations of one or more other Federal departments or agencies issued under title IX, the Director may, by agreement with such other departments or agencies where applicable, provide for the conduct of consolidated or joint hearings, and for the application to such hearings of rules of procedures not inconsistent with this part. Final decisions in such cases, insofar as this regulation is concerned, shall be made in accordance with § 86.65.

(Sec. 902, Education Amendments of 1972, 86 Stat. 374; 20 U.S.C. 1682)

§ 86.65 Decisions and notices.

(a) *Decisions by administrative law judges.* Within 30 days after a hearing is held by an administrative law judge such administrative law judge shall either make an initial decision, if so authorized, or certify the entire record including his or her recommended findings and proposed decision to the reviewing authority for a final decision, and a copy of such initial decision or certification shall be mailed to the applicant or recipient and to the complainant, if any. Where the initial decision referred to in this paragraph or in paragraph (c) of this section is made by the administrative law judge, the applicant or recipient or the Department may within 30 days after [illegible]

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suance of the initial decision, file with the reviewing authority exceptions to the initial decision, with his or her reasons therefor. Upon the filing of such exceptions the reviewing authority shall review the initial decision and issue its own decision including the reasons therefor. In the absence of exceptions the initial tions the reviewing authority shall recision, subject to the provisions of paragraph (e) of this section.

(b) *Decisions on record or review by the reviewing authority.* Whenever a record is certified to the reviewing authority for decision or it reviews the decision of an administrative law judge pursuant to paragraph (a) or (c) of this section, the applicant or recipient shall be given reasonable opportunity to file with it briefs or other written statements of its contentions, and a copy of the final decision of the reviewing authority shall be given in writing to the applicant or recipient and to the complainant, if any.

(c) *Decisions on record where a hearing is waived.* Whenever a hearing is waived pursuant to § 86.64(a) the reviewing authority shall make its final decision on the record or refer the matter to an administrative law judge for an initial decision to be made on the record. A copy of such decision shall be given in writing to the applicant or recipient, and to the complainant, if any.

(d) *Rulings required.* Each decision of an administrative law judge or reviewing authority shall set forth a ruling on each finding, conclusion, or exception presented, and shall identify the requirement or requirements imposed by or pursuant to this part with which it is found that the applicant or recipient has failed to comply.

(e) *Review in certain cases by the Secretary.* If the Secretary has not personally made the final decision referred to in paragraph (a), (b), or (c) of this section, a recipient or applicant or the Department may, within 30 days after issuance of the final decision by the reviewing authority, request the Secretary to review such decision. Such review is not a matter of right and will be granted only where the Secretary determines there are special and important reasons therefor. The Secretary's decision to undertake or not to undertake review will be communicated in writing, within 30 days after such request, to each party, including amicus curiae, if any. The Secretary may grant or deny such request, in whole or in part. He or she may also review such a decision upon his or her own motion in accordance with rules of procedure issued by the Director. The Secretary's decision to undertake such review will be communicated in writing within 30 days after the issuance of the reviewing authority's decision, to each party, including amicus curiae. Failure of an applicant or recipient to file an exception with the reviewing authority or to request review under this paragraph shall not be deemed a failure to exhaust administrative remedies for the purpose of obtaining judicial review.

(f) *Final agency action for purposes of judicial review.* (1) Except as provided in paragraph (f)(2) of this section, a decision under this section will become the final decision of the Department and will constitute final agency action within the meaning of section 704 of title 5 of the United States Code in the following manner:

(i) A decision by an administrative law judge pursuant to paragraph (a) will become final on the 21st day after such decision is made, unless prior to such day review by the reviewing authority has been requested.

(ii) A decision by the reviewing authority pursuant to paragraph (b) of this section will become final on the 31st day following its issuance unless review by the Secretary is requested prior to such day under paragraph (e) of this section, or unless the Secretary undertakes review on his or her own motion prior to such day under paragraph (e) of this section; or on the 31st day following a request that the Secretary review such decision under paragraph (e) of this section, unless the Secretary prior to such day grants such review.

(iii) A decision of the Secretary under paragraph (c) of this section will become final on the day following its issuance.

(2) A decision to terminate or to refuse to grant or continue Federal financial assistance, which would otherwise constitute the final decision of the Department and final agency action pursuant to paragraph (f)(1) of this section, shall not constitute such action until the Secretary transmits it as such to the appropriate Congressional committees with the report required under section 902 of the Education Amendments of 1972.

(g) *Content of orders.* The final decision may provide for suspension or termination of, or refusal to grant or continue Federal financial assistance, in whole or in part, to which this part applies, and may contain such terms, conditions, and other provisions as are consistent with and will effectuate the purposes of title IX and this part, including provisions designed to assure that no Federal financial assistance to which this part applies will thereafter be extended to the applicant or recipient determined by such decision to be in default in its performance of an assurance given by it pursuant to this part, or to have otherwise failed to comply with this part unless and until it corrects its noncompliance and satisfies the Director that it will fully comply with this part.

(h) *Post-termination proceedings.* (1) An applicant or recipient adversely affected by an order issued under paragraph (f) of this section shall be restored to full eligibility to receive Federal financial assistance if it satisfies the terms and conditions of that order for such eligibility or if it brings itself into compliance with this part and provides reasonable assurance that it will fully comply with this part.

(2) Any applicant or recipient adversely affected by an order entered pursuant to paragraph (g) of this section may at any time request the Director to restore fully its eligibility to receive Federal financial assistance. Any such request shall be supported by information showing that the applicant or recipient has met the requirements of paragraph (h)(1) of this section. If the Director determines that those requirements have been satisfied, he or she will restore such eligibility.

(3) If the Director denies any such request, the applicant or recipient may submit a request for a hearing in writing, specifying why it believes such official to have been in error. It shall thereupon be given an expeditious hearing, with a decision on the record, in accordance with rules of procedure issued by the Director. The applicant or recipient will be restored to such eligibility if it proves at such hearing that it satisfied the requirements of paragraph (h)(1) of this section. While proceedings under this paragraph are pending, the sanctions imposed by the order issued under paragraph (f) of this section shall remain in effect.

(4) The pendency of any proceeding under this paragraph shall not lift or stay the sanctions imposed by the order issued under paragraph (g) of this section.

(Sec. 902, Education Amendments of 1972, 86 Stat. 374; 20 U.S.C. 1682)

§ 86.66 Judicial review.

Action taken pursuant to section 902 of the Education Amendments of 1972 is subject to judicial review as provided in section 903 of the Amendments.

(Sec. 903, Education Amendments of 1972, 86 Stat. 374; 20 U.S.C. 1683)

[FR Doc.74-14197 Filed 6-19-74;8:45 am]

UNITED STATES
COMMISSION ON
CIVIL RIGHTS

1121 Vermont Avenue, N.W.
Washington, D.C. 20425

January 23, 1991

The President
The White House
Washington, D.C. 20500

Dear Mr. President:

We are writing to express our grave concern about the minority scholarship policy announced last month by the Education Department's Office for Civil Rights (OCR). This policy contradicts not only the priority you have established for education during your administration, but important, long-term national interests as well.

The Commission disagrees with OCR's sudden announcement that Title VI of the Civil Rights Act of 1964 prohibits the funding of minority-targeted scholarships by institutions receiving federal financial assistance. In our judgment, the law permits educational institutions to make reasonable use of minority-targeted scholarships when necessary to overcome the effects of discrimination or to achieve the legitimate and important goal of a culturally diverse student body.

Furthermore, the Commission is persuaded that it is essential to important social, economic and educational interests of this nation that colleges and universities be allowed to continue to utilize such scholarships as part of their affirmative efforts to recruit and retain minority students.

Finally, we believe that administration policy in this area of vital national concern is too critical to America's future to be relegated to subcabinet level pronouncements that leave an entire educational community confused.

Although OCR's new policy would permit institutions to administer privately funded minority-targeted scholarships, it would prohibit the use of an institution's general funds for the same purpose. This distinction is not only legally insupportable, but also provides little relief from the overall impact of the new policy. Because general funds provide most of the existing minority scholarships, this restriction, if allowed to stand, could have a devastating effect on the efforts of our colleges and universities to increase diversity and to remedy the effects of discrimination.

Minority students today continue to face serious barriers to equal educational opportunity on college campuses. Too often, minority students attending predominantly white institutions of higher learning encounter either indifference to their needs or outright racial hostility. On many campuses, they experience both. Institutions struggling to overcome the effects of racism on their efforts to recruit and retain minority students need the flexibility to design effective affirmative outreach programs. These institutions use minority-targeted scholarships as a means of letting minority students know that their presence and full participation in campus life is not merely accepted but sought after as a matter of important national and institutional interest. Many institutions have identified these scholarships as an essential tool, without which the effectiveness of their outreach efforts will be seriously impaired.

The role of institutions of higher education in achieving important national goals is well recognized. In a society such as ours – with a diverse and multi-cultural citizenry – these institutions can and must contribute to the achievement and maintenance of social strength and harmony. The education of a diverse student body, convened on common ground for common purposes, is their primary vehicle for making this contribution. To thwart their efforts by prohibiting even the very limited use of a tool so many have found essential can only help to perpetuate the racial and ethnic divisions within our society.

As we approach the year 2000, our economy requires a leadership role by colleges and universities to meet the demand for increasingly high education levels in the workforce. With a growing percentage of new minority entrants into the working population, the nation's economic vitality in the 21st century will depend on how well we educate minority youth. Facing these challenges, we can scarcely afford to abandon any tool that encourages minority students to pursue a college education, or that enables a college to educate its students in a culturally diverse environment.

OCR's reversal of prior policy has already brought confusion. Colleges and universities are reexamining their scholarship policies, and most can be expected to reconsider their minority scholarship programs against the likelihood of litigation fostered by the OCR announcement. Obviously, in this environment, many institutions may now feel compelled to drop their minority scholarship programs as the "safest" position. Meanwhile students and future students face the uncertainty this unfortunate situation has caused as to whether they will be financially able to continue their education. It is imperative that this damage be undone.

Mr. President, you have made strengthening this country's education system one of your top policy goals. Addressing the overwhelming educational needs of minority youth is essential to that task. We urge you, therefore, to take a strong stand in support of affirmative action in the recruitment of minority students, including the use of minority-targeted scholarships where necessary to achieve either of two important national interests – remedying the invidious effects of discrimination and attaining the benefits of a diverse student body.

We recommend further that you direct the Secretary of Education to promulgate, after consultation with the higher education community, clearly defined guidelines that implement that strong national policy of affirmative action. Finally, we urge that you take these steps forthwith, so as to avoid even greater uncertainty than OCR's actions have caused to date.

Respectfully,

FOR THE COMMISSIONERS

ARTHUR A. FLETCHER
Chairman

CITIZENS' COMMISSION ON
CIVIL ★ RIGHTS
2000 M Street, N.W.
Suite 400
Washington, D.C. 20036
202 / [illegible]

January 14, 1991

The Honorable William D. Ford
Chairman of House Education and Labor Commission
U.S. House of Representatives
2181 Rayburn House Office Building
Washington, DC 21015

Dear Chairman Ford,

Enclosed for inclusion in the record of the Committee's oversight hearing on minority student scholarships, are two chapters from our recently published book One Nation, Indivisible: The Civil Rights Challenge For The 1990's. These chapters are:

Chapter VIII - Affirmative Action In Higher Education: The Constitutional Constraints, by Professor Gil Kujovich

Chapter VI - Minority Access To Higher Education, by John Silard

I hope these articles are of use to you.

Sincerely yours,

Susan M. Liss

Susan M. Liss
Director

Enclosures

One Nation, Indivisible:

The Civil Rights Challenge for the 1990s

Edited by
Reginald C. Govan
and William L. Taylor

Report of the
Citizens' Commission
on Civil Rights

MEMBERS OF THE CITIZENS' COMMISSION

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  Former Chairman, Subcommittee on the Constitution

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  Former Chairman, Equal Employment Opportunity Commission

Arthur Flemming; Chairman, Citizens' Commission on Civil Rights; Chairman, Save Our Security Coalition; and Chairman, National Health Care Campaign
  Former Chairman, U.S. Commission on Civil Rights
  Former Secretary, Department of Health, Education and Welfare

Frankie Freeman; Freeman, Whitfield, Montgomery and Staples; St. Louis, Missouri
  Former Member, U.S. Commission on Civil Rights
  Former Inspector-General, Community Services Administration

Erwin N. Griswold; Jones, Day, Reavis and Pogue; Washington, D.C.
  Former Solicitor General of the United States
  Former Member, U.S. Commission on Civil Rights

Aileen Hernandez; Hernandez and Associates; San Francisco, California
  Former Member, Equal Employment Opportunity Commission
  Former Chair, National Organization for Women

Theodore M. Hesburgh; President Emeritus, Notre Dame University
  Former Chairman, U.S. Commission on Civil Rights

Ray Marshall; President, The National Policy Exchange; Washington, D.C.
  Former Secretary, Department of Labor

William M. Marutani; Dilworth, Paxton, Kalish, and Kaufman, Philadelphia, Pennsylvania;
  Former Judge, Court of Common Pleas of Pennsylvania
  Member, Commission on Wartime Relocation and Internment of Civilians

Eleanor Holmes Norton; Professor of Law Georgetown University Law Center
  Former Chair, Equal Employment Opportunity Commission

Elliot L. Richardson; Milbank, Tweed, Hadley and McCloy; Washington, D.C.
  Former Attorney General
  Former Secretary, Department of Health, Education and Welfare

Manuel Ruiz; Ruiz and Ruiz; Los Angeles, California
  Former Member, U.S. Commission on Civil Rights

Murray Saltzman; Senior Rabbi; Baltimore Hebrew Congregation
  Former Member, U.S. Commission on Civil Rights

William L. Taylor; Attorney, Washington, D.C.
  Former Staff Director, U.S. Commission on Civil Rights

Harold R. Tyler; Patterson, Belknap, Webb and Tyler; New York, New York
  Former Deputy Attorney General
  Former Assistant Attorney General for Civil Rights
  Former Judge, U.S. District Court, Southern District of New York

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Reginald Govan
  Director and Counsel

Gwen E. Benson-Walker
  Project Administrator

CHAPTER VIII

AFFIRMATIVE ACTION IN HIGHER EDUCATION: THE CONSTITUTIONAL CONSTRAINTS

by Professor Gil Kujovich ©

I. Introduction

The statistical summary provided in Chapter IX, demonstrates that equality in higher education has not been achieved. Federal efforts to reach that goal through policy initiatives that do *not* use racial classifications--such as increased funding of Upward Bound or financial aid to needy college students--raise no serious constitutional issues. Such broadly based programs, however, have the disadvantage of not targeting the racial and ethnic minorities most severely under-represented in higher education. The most direct and efficient means of achieving racial equality in higher education necessarily involves the racial targeting of federal programs. A racially based allocation of governmental benefits, however, raises complex issues of constitutional law. The constitutional principles defining the reach of federal power to remedy racial imbalances in higher education are the subject of this discussion.

Constitutional principles of equality were early interpreted to impose the strictest limits when the government uses racial classifications that *disadvantaged* a racial minority. One clear purpose of the equal protection clause was to protect the nation's black population from racial discrimination. Not long after the Fourteenth Amendment was adopted, the Supreme Court held more generally that the clause afforded its strictest protection to other racial and ethnic minorities.

The basis for this interpretation is the position of minorities in American society. Minorities traditionally have lacked effective political power, have historically been subjected to discrimination, and have been the targets of racial prejudice. When minorities are disadvantaged by a racially based classification, there is good reason for a court to be "suspicious" of the classification and to strictly scrutinize the governmental justifications for using it.

In light of the manner in which racial minorities--and particularly blacks--were treated by both the state and federal governments in the first century after the adoption of the Fourteenth Amendment, it is not surprising that it was not until the 1970s that the Court first confronted the issue of whether a racial classification *favoring* a racial minority should be evaluated under the same strict standards used for those disadvantaging minorities. There are a variety of reasons why a governmental body may choose to use such "benign" racial classifications. For purposes of the present discussion, the most important of these is the use of racially based "affirmative action" to remedy past racial discrimination and its effects. Beginning in 1978, the Supreme Court has decided a small group of cases concerning racially based affirmative action with remedial purposes.

Section II of this Chapter reviews briefly the history of discrimination in higher education against the nation's largest racial minority--black Americans. Section III discusses the Supreme Court's cases concerning the constitutionality of remedial affirmative action undertaken by state and local governmental bodies. Section IV considers whether the constitutional constraints are different when the federal government undertakes affirmative action. Finally, Section V explores some of the policy implications of the affirmative action cases and suggests some affirmative action policy initiatives that might be undertaken by a new administration.

II. The History and Legacy of Racial Discrimination in Public Higher Education[1]

For nearly a century after the Civil War, America's black population received the benefits of publicly supported higher education almost exclusively through a system of "separate but equal" institutions established in the southern and border states. The black public colleges created after the War were always racially separate, but never equal. Consequently, the black population was denied the educational, economic, and social advantages afforded to the nation's white population through the rapid expansion of public higher education between 1860 and 1960.

In both state and federal funding, blacks suffered consistent and long-lasting discrimination in public higher education. As late as 1940, when black Americans accounted for more than 20 percent of the population in the "separate but equal" states, black public colleges expended only five percent of the public funds devoted to higher education. Nearly 60 percent of all blacks in the *nation* resided in states that offered their black citizens only one or two small, underfunded public colleges. In states accounting for 40 percent of all black Americans, there was *no accredited* public college available to black students.

Insufficient funding, combined with the accumulated deficiencies of an inadequate educational system, from primary school to college, produced an educational program at black public colleges that fell far short of equality. Training in the sciences and for the professions was not available to black students. The would-be black engineer, enrolled in a public college, was limited to the study of auto mechanics, carpentry and printing, while the aspiring biologist, chemist, or physicist was frequently restricted to the study of general science.

The NAACP's campaign to overturn the constitutional doctrine of separate but equal brought some improvements in black higher education during the 1940s and 1950s, but equality in the racially separate system was never achieved. Underfunded out-of-state scholarship programs (continued long after the Supreme Court found them constitutionally insufficient), efforts to pool resources for regional education of blacks, and grossly inadequate increases in the funding of black colleges were among the unsuccessful efforts made to defend against the constitutional assault on separate but equal education. When the doctrine of separate but equal suffered its inevitable demise in the 1950s, the effects of long-lasting discrimination were painfully evident in the black population.

One effect of long-lasting discrimination was a black population severely deprived of education. In the segregationist states in 1950, 19 percent of persons aged 25 and older were blacks, but blacks constituted less than 7 percent of the college-educated population. Black representation in the professions reflected the century-long denial of access to publicly supported professional schools and programs of advanced training:

> One need not embrace a system of racial 'quotas' for the professions to find discrimination and injustice in a black work force of more than 3.5 million that included only 4600 lawyers and judges, engineers, chemists and other natural scientists, physicians and surgeons, dentists, pharmacists, architects, accountants and auditors, surveyors, designers and draftsmen--just over one percent of the 401,000 professionals in these categories.[2]

Discrimination in education below the college level yielded a population of black youths who graduated from high school at less than half the rate of white youths. For those black students who did graduate, continuing inequality in elementary and secondary education left many ill-prepared to take advantage of gradually broadening opportunities for higher education. The legacy of discrimination persisted, and could not be remedied simply by affording black youths the chance for "equal competition" with whites in college admissions.

The persistent effects of past discrimination are evident today in the continuing underrepresentation of blacks in the nation's colleges and graduate schools. And, as suggested in Chapter IV, those continuing effects are compounded and amplified by the concentration of black students in separate and unequal, inner-city elementary and secondary school systems. If the long-deferred goal of equality in education is to be achieved, aggressive and effective affirmative action is essential. The scope and nature of such affirmative action will be shaped, in part, by the constitutional constraints on the use of racially based classifications.

III. Constitutionality of Affirmative Action By State and Local Governmental Bodies

In the past decade, the Supreme Court has decided only a few affirmative action cases raising constitutional issues. The first of these, *Bakke*, is an unusual case in that only five of the justices considered the constitutional issues, and they could not agree on how those issues should be decided. Nevertheless, *Bakke* is important because it defined, even if it did not resolve, the major constitutional issues.

A. University of California Regents v. Bakke

During the early 1970s, the Medical School of the University of California at Davis created an affirmative action admissions program by setting aside sixteen positions (of one hundred total) for disadvantaged minority applicants. Applicants for the sixteen positions were evaluated separately from the general applicant pool. Alan Bakke, a rejected white applicant, claimed that the minority admissions program was unconstitutional because it excluded him from its benefits on the basis of his race. In a 5-4 decision, the Supreme Court invalidated the affirmative action admissions program.[1]

Understanding the constitutional aspects of *Bakke* requires an examination of two opinions in the case: that of Justice Powell and that of Justice Brennan. Although neither opinion commanded a majority of the Court, the opinions define the two major issues that have come to dominate affirmative action cases: (1) under what circumstances is the government's interest in remedying discrimination substantial enough to justify the use of a racial classification and (2) what constitutes a sufficiently narrow tailoring of the classification to that remedial purpose.

Both justices agreed that the purpose of remedying past racial discrimination can be sufficiently weighty to justify racially based affirmative action. They disagreed on the conditions necessary to establish the constitutionally adequate purpose.

Justice Brennan concluded that affirmative action by an institution of higher education is constitutional when it is designed to remedy past discrimination regardless of whether the particular institution had engaged in discrimination or, more generally, the discrimination was by society at large. As long as the racial minorities aided by the program are substantially and chronically underrepresented, and there is a sound basis for concluding that the underrepresentation is the product of past discrimination, racially based affirmative action is constitutional.

Justice Powell created narrower constraints on the remedial use of affirmative action. Under his view, racially based remedies are not a constitutionally acceptable means of remedying "societal discrimination." To justify affirmative action, there must be a finding of discrimination more specific than that by society at large. Although his *Bakke* opinion is not completely clear, Justice Powell seemed to conclude that affirmative action can be used to remedy only that discrimination for which the body engaging in affirmative action is responsible.

The two justices also differed on how precise a connection there must be between the racial classification and the remedial goal. This connection, or "fit," can be expressed in terms of the "victim specificity" of the program. Justice Powell seemed to demand a very narrow fit that would restrict the benefits of an affirmative action program to actual and identified victims of past discrimination. Justice Brennan, however, seemed to require only that the benefitted individuals belong to a racial minority that, as a group, suffered from past discrimination.

Bakke thus defined two key constitutional issues: (1) whether affirmative action programs must be so narrowly tailored as to limit their benefits to identified victims of discrimination and (2) whether such programs can be used to remedy racial discrimination beyond that of the body engaging in affirmative action.

B. The Post-*Bakke* Cases

In two cases decided nearly a decade after *Bakke* the Court elaborated on the extent to which the Constitution demands victim specificity to justify an affirmative action remedy for past discrimination. In a third case, the Court returned to the question of whether affirmative action remedies may be used to remedy "societal discrimination."

1. Victim-Specificity.

In *Sheet Metal Workers v. EEOC*,[4] a union engaged in longstanding discrimination against nonwhite persons seeking to join the union. The remedy ordered by the district court included a union membership goal of 29 percent nonwhites and the creation of a fund for training and recruitment of nonwhite apprentices and union members. In *United States v. Paradise*[5], the Alabama Department of Public Safety (state police) engaged in an extended pattern of discrimination against blacks. After the Department's long delay in complying with a variety of remedial orders, the district court ordered that promotions to any rank with fewer than 25 percent blacks had to be done at the rate of one black for each white promoted. The remedies in both cases were challenged as unconstitutional racial preferences for persons not identified as victims of the defendants' past discrimination.

In 5-4 decisions, the Supreme Court upheld the affirmative action remedies ordered by the lower courts.[6] In so doing, a plurality of the Court endorsed a potentially far-reaching justification for affirmative action relief.[7] This justification recognizes that affirmative action may be used to remedy the *effects* of discrimination that continue even after discriminatory actions have ended. The effects specifically considered in the two cases were what might be described as "structural" effects.

After an employer has ceased its unlawful acts, its reputation for discrimination and the absence of or small percentage of minorities may continue to discourage minorities from even applying.[8] Or applicant pools may be created through informal contacts unavailable to potential minority applicants. And the absence of minorities in the upper ranks of an employer's workforce may itself be an effect of discrimination in initial hiring.[9] In *Sheet Metal Workers* and *Paradise*, a plurality of the Court found affirmative action in hiring and promotion a constitutionally acceptable means of remedying these structural effects of discrimination.

In both cases, judicial determinations of substantial and long-lasting discrimination by the defendants created a compelling governmental interest in remedying that discrimination and its effects. In considering whether the affirmative action remedies were "narrowly tailored" to that interest, however, the Court could not, and did not, require that the remedy be confined to identified victims of discrimination. The remedies were directed to the structural effects of discrimination and did not even purport to target victims:

> The purpose of affirmative action is not to make identified victims whole, but rather to dismantle prior patterns of . . . discrimination and to prevent discrimination in the future. Such relief is provided to the class as a whole rather than to individual members; no individual is entitled to relief and beneficiaries need not show that they were themselves victims of discrimination.[10]

Instead of victim specificity, the plurality adopted a multifactored test to determine when an affirmative action remedy is narrowly tailored: (1) efficacy of alternative remedies, (2) flexibility and duration of the affirmative action remedy, (3) basis for a percentage goal, and (4) impact on innocent third parties.[11] In general, these factors are designed to ensure that the harm to innocent third parties is minimized and that affirmative action is not used to achieve racial balance for its own sake, but has a genuine remedial function.

Sheet Metal Workers and *Paradise* are important refinements of the constitutional limits on the use of affirmative action. The cases, however, have two significant limits. First, because they focused on the *structural* effects of past discrimination, they did not consider whether victim specificity is constitutionally required when affirmative action is used to remedy the effects of past discrimination manifested in the minority populations which have been subjected to discrimination. Second, the two cases provide no further insight into the nature of discrimination that will justify an affirmative action remedy. In both cases, there were clear judicial findings that the defendants themselves had engaged in persistent and egregious racial discrimination.

The question of whether affirmative action could constitutionally be used to remedy the effects of more broadly based discrimination was considered in another of the post-*Bakke* cases.

2. *The Nature of Past Discrimination.*

In *Bakke*, Justice Powell concluded that an affirmative action admissions program could not be justified as a remedy for "societal discrimination," a notion he rejected as "an amorphous concept of injury."[12] The opinion, however, is nearly opaque as to the meaning of the term "societal discrimination" and thus as to the nature of past discrimination that Justice Powell considered inadequate to justify an affirmative action remedy.

Nearly a decade later, in *Wygant v. Jackson Board of Education*[13], Justice Powell provided further clarification. In *Wygant* a local school board undertook voluntary affirmative action that resulted in the laying off of white teachers who had more seniority than minority teachers who were retained. Displaced white teachers claimed that the racial preference violated the equal protection clause. Initially denying that it had itself discriminated in the employment of teachers, the board nevertheless defended its layoff procedure as an effort to remedy the effects of societal discrimination.

Justice Powell rejected societal discrimination as "too amorphous a basis for imposing a racially classified remedy":

> No one doubts that there has been serious racial discrimination in this country. But as the basis for imposing discriminatory *legal* remedies that work against innocent people, societal discrimination is insufficient and over-expensive. In the absence of particularized findings, a court could

> uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future.[14]

Justice Powell defined "societal discrimination" to include any discrimination *except* that engaged in by the governmental unit using an affirmative action program:

> This Court has never held that societal discrimination alone is sufficient to justify a racial classification. Rather, the Court has insisted upon some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination.[15]

Read together, *Wygant*, *Sheet Metal Workers*, and *Paradise* offer only narrow opportunities for affirmative action in higher education. Under *Wygant*, previous discrimination by the institution engaging in affirmative action is a constitutionally required predicate, whether the affirmative action program is voluntarily undertaken or judicially ordered. Where the predicate of past discrimination is established, however, the Constitution permits affirmative action that benefits nonvictims to eliminate at least the structural vestiges of discrimination.

The cases thus seem most relevant to desegregation remedies for what were once separate but equal systems of public higher education. Continuing racial duality in the public colleges of the southern and border states is a structural effect of past discrimination. Affirmative action designed to eliminate that effect, and that complies with the limits of *Sheet Metal Workers* and *Paradise*, would not violate the Constitution.

Whether the Constitution permits broader programs of affirmative action in institutions across the nation, regardless of whether those institutions have themselves discriminated on the basis of race, depends on Congress's power to enact statutes providing for affirmative action remedies.

IV. Congressional Power to Enact Affirmative Action Remedies

The Supreme Court's affirmative action cases include only one case considering congressional power to use race conscious measures as a means of remedying past discrimination. Understanding that case requires a brief exploration of earlier cases defining congressional power under the enforcement clauses of the Civil War Amendments.

A. The Enforcement Clause Cases

Each of the Civil War Amendments grants to Congress the power to enforce, by appropriate legislation, the provisions of the amendments. During the 1960s, the Court developed an expansive view of congressional authority under the enforcement clauses, upholding federal civil rights statutes as long as the enforcement means selected by Congress was a rational one. For present purposes, the most important of these cases are those concerning the Voting Rights Act of 1965 and its amendments.[16]

As developed in these cases, congressional power under the enforcement clauses goes beyond the authority to prohibit governmental actions that directly violate the Constitution. Congress also has the power to prohibit otherwise constitutional actions in order to remedy the effects of discrimination. This remedial authority and its relationship to affirmative action is evident in enforcement clause cases concerning the Voting Rights Act's banning of literacy tests as a qualification for voting.

As originally enacted, the ban on literacy tests applied for five years to statutorily defined covered jurisdictions. A covered jurisdiction could "bail out" from coverage by establishing that the prohibited test had not been used in a discriminatory manner during the previous five years.[17] The literacy test ban is of particular interest since the Court had six years earlier rejected an equal protection challenge to the use of the literacy tests.[18] Thus, Congress had exercised its enforcement powers to prohibit a practice that did not necessarily violate the Constitution.

In *South Carolina v. Katzenbach* the Court upheld the five-year suspension of literacy tests as a constitutionally permissible means of addressing the effects of past discrimination. The Court held that even if the tests were fairly administered, they would perpetuate or "freeze the effect of past discrimination in favor of unqualified white registrants" who had registered to vote before the test had been adopted.[19] Although a fairly administered literacy test did not violate the Constitution, Congress could prohibit such tests as a means of remedying the effects of past discrimination.

In *Gaston County v. United States* the Court took the next step and upheld Congress's power to prohibit otherwise constitutional actions in one governmental activity as a means of addressing the effects of past discrimination in another governmental activity. In rejecting the county's effort to bail out from the literacy test ban, the Court relied on the fact that the test fell more heavily on black residents to whom the county had denied equality in public education. Assuming that the literacy test was administered without racial discrimination, the Court concluded that it was within the congressional enforcement power to prohibit use of a test that "would serve only to perpetuate [past] inequities in a different form."[20]

The reach of the enforcement clauses to remedy the effects of past discrimination was somewhat limited by the facts of *Gaston County*. The county was both the agent of past discrimination in education and the governmental body perpetuating the effects of that discrimination. Thus, the case did not raise the question of whether Congress could remedy the effects of "societal discrimination," as that term was later defined in *Wygant*. Nevertheless, the Court observed in dicta that "[i]t would seem a matter of no legal significance that [Gaston County's voters] may have been educated in other counties or states also maintaining segregated and unequal school systems."[21]

This dicta became law when Congress amended the Voting Rights Act in 1970 to include a nationwide suspension of literacy tests. Arizona challenged this amendment, claiming that it had not discriminated either in education or in the use of its literacy test, and that it "should not have its laws overridden to cure discrimination on the part of governmental bodies elsewhere in the country."[22] In *Oregon v. Mitchell* the Court upheld this exercise of the enforcement power to remedy what is now called societal discrimination.

Justice Brennan, writing for three justices, concluded that the congressional power to remedy the effects of educational discrimination "does not end when the subject removes himself from the jurisdiction in which the injury occurred."[23] Justice Stewart, also writing for three justices, concluded that Congress was not required to make state-by-state findings on inequality of educational opportunity or on the actual impact of literacy tests. Unlike a court, which is confined to deciding individual cases on individual records, "Congress may paint with a much broader brush."[24] In Justice Stewart's view, nationwide legislation was appropriate when Congress acts against an "evil such as racial discrimination which in varying degrees manifests itself in every part of the country."[25]

B. Comparison of Enforcement Clause and Affirmative Action Cases

In both *Sheet Metal Workers* and *Paradise* the remedial orders were limited to the effects of the defendants' clearly identified discrimination. More generally, *Wygant*'s definition of "societal discrimination" makes defendant-specific, past discrimination a constitutional requirement for an affirmative action remedy. In the enforcement clause cases, however, the Court upheld a congressional power to remedy the effects of "societal discrimination."

The reasons for this are clear. Congress does not decide individual cases based on individual records. Its jurisdiction and responsibilities extend to the nation. In devising national policies to remedy the legacy of discrimination, as in other legislative activities, congressional factual inquiries and fact findings are necessarily more general. Indeed, it would be an abandonment rather than a fulfillment of its responsibility under the Fourteenth Amendment, if Congress focused its remedial powers only on the discriminatory acts of discrete actors and not on the effects of discrimination in the broader society.

With regard to the issue of victim specificity, the enforcement clause cases go beyond the "structural" effects of past discrimination that were the subject of affirmative action remedies in *Sheet Metal Workers* and *Paradise*. The enforcement clause remedies were directed to those effects of past discrimination that manifest themselves in the minority population--the continuing effects of educational deprivation. Nevertheless, the Court did not require case-by-case determinations of which individuals were actual victims. Congress could constitutionally rely on a broadly based relief that reached actual victims as well as some nonvictims.

Again, the reasons for this flexibility in the congressional remedial power is not difficult to discern. When Congress seeks to remedy the effects of educational discrimination, the task of defining which specific individuals suffer from those effects is a formidable one. In suspending literacy tests, for example, Congress had a clear basis for concluding generally that racial inequality in education affected the number of blacks permitted to vote. If, however, the remedy for past discrimination were limited to persons who could establish that their ability to pass a literacy test was actually impeded by past denial of educational equality, the enforcement and effectiveness of remedial legislation would have become an unmanageably complex matter. The effects of discrimination in education can be both subtle and varied. Determinations of which individuals were sufficiently victimized by past discrimination--or even what constitutes sufficient victimization--would not only generate costly and time-consuming litigation but would impose an unrealistic burden on the implementing governmental body and, ultimately, the courts.

The enforcement clause cases suggest an answer to but do not decide the question of whether the principles governing the constitutionality of race-conscious affirmative action are different when Congress undertakes the affirmative action remedy. The cases establish that the remedial power under the enforcement clauses can reach societal discrimination and that Congress need not restrict itself to victim specific remedies. They do not, however, consider the scope of that power in the context of a racially based remedy. Although Congress sought to provide relief to minority voters who had suffered educational discrimination, the Voting Rights Act did not distinguish among voters on the basis of race: the suspension of literacy tests applied to all voters. Unlike the affirmative action cases, there were no white persons who could claim to be disadvantaged by a racial classification.

Congress's use of affirmative action to remedy past discrimination thus presents a conflict between the broad remedial power upheld in the enforcement clause cases and the more restrictive remedial authority applicable to affirmative action undertaken by governmental bodies other than Congress. While the Court has not yet clearly resolved that conflict, it revealed some of the relevant considerations, and difficulties, in *Fullilove v. Klutznick*.[26]

C. Affirmative Action by Congress

In *Fullilove* the Court upheld, 6-3, federal legislation mandating that recipients of federal funds for public works use at least 10 percent of such funds to purchase services or supplies from "minority business enterprises" (MBE).[27] Although a majority of the Court did not agree on a rationale for its judgment that the statute was constitutional,[28] the six members of the Court voting to uphold the statute did agree on one important point.

All six justices in the majority explicitly recognized that Congress had the broadest governmental power to remedy past discrimination and its effects. More specifically, the majority opinions implicitly, but clearly, rejected the view that Congress lacked power to adopt race-conscious, affirmative action remedies for societal discrimination, as that term was subsequently defined in *Wygant*. The congressional determination of past discrimination in *Fullilove* was of the most general sort.[29] Congress did not make specific findings of discrimination in public construction contracts by particular state and local governments. Nor was there any indication that Congress itself had discriminated in disbursing federal contracting funds. Finally, neither the statute nor the regulations implementing it exempted a state or local government that had not engaged in past discrimination.[30]

In this regard *Fullilove* extends the power recognized in the voting rights cases to affirmative action remedies. The congressional enforcement power may constitutionally be applied to remedy the effects of broadly based discrimination--whether it be in public contracting funds or in education. In requiring remedial action, the congressional power reaches to entities that may not themselves be guilty of any past discrimination. The authority of Congress depends on its conclusion that the effects of past discrimination continue, not on the particular sources of discrimination or on the "guilt" of the entities required to implement the remedial action.[31]

Fullilove is more ambiguous on the issue of victim specificity. It appears that in enacting the set-aside the general focus of congressional concern was on the victimized class and not the structural effects that justified affirmative action remedies in *Sheet Metal Workers* and *Paradise*.[32] Moreover, on its face, the statute did not require individualized determinations identifying specific victims. Rather, Congress appeared to afford the set-aside benefit to all members of the victimized racial groups.

The absence of victim specificity in the statute was not a concern to four of the six justices in the majority. Without discussing the victim specificity issue, Justice Marshall (writing for three justices) and Justice Powell (writing for himself) seemed to conclude implicitly that affirmative action remedies enacted by Congress share a substantial measure of the flexibility evident in enforcement clause cases not involving racial classifications. Congressional remedies for past discrimination may be painted with a broader brush and confer benefits on nonvictims as part of the effort to afford relief to victims.

Fullilove's ambiguity concerning victim specificity is found in the opinion authored by the Chief Justice (and joined by two additional justices). Through a creative construction of the statute and its implementing regulations, Chief Justice Burger concluded that the set-aside program prohibited set-aside awards to nonvictim minority businesses. Although his opinion falls short of complete clarity, the Chief Justice seemed to conclude that congressionally enacted affirmative action remedies require victim specificity and that the set-aside program in *Fullilove* met that requirement.

Dissenting, Justice Stevens questioned whether the determinations required by Chief Justice Burger's interpretation of the statute were feasible:

> [I]t is not easy to envision how one could realistically demonstrate with any degree of precision, if at all, the extent to which a bid has been inflated by the effects of disadvantage or past discrimination. Consequently, while the Chief Justice describes the set-aside as a remedial measure, it plainly operates as a flat quota.[33]

Justice Stevens' observation, that it is unrealistic to make precise distinctions between those who have been sufficiently victimized by past discrimination and those who have not, is surely correct. The effects of discrimination may be subtle, not easily proven, and may manifest itself in differing ways and degrees in different persons. The inability to make precise distinctions as to those effects, however, does not mean that general measures designed to counter them lose their remedial character. The allocation of public works funds to minority businesses, just as the nationwide suspension of literacy tests, used a broad sweep to ensure that actual victims would not be excluded from the remedy and thus necessarily extended benefits to some nonvictims.

In his *Fullilove* opinion, Chief Justice Burger observed:

> It is fundamental that in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees.[34]

To say that congressional affirmative action measures targeted on a victimized group are invalid because of their failure to satisfy a demand for victim specificity would be tantamount to concluding that the organ of government with the most "comprehensive remedial power" lacks the authority to remedy what may be the most persistent effects of racial discrimination. The unique remedial authority and competence of the national legislature is most needed where the effects of discrimination are least amenable to remedy through case-specific decisions. If Congress cannot act in response to the subtle influences of the long-lasting discrimination, then no governmental body can.

The primary concern behind the demand for victim specificity is the interest of innocent third parties. Affirmative action involves a racially based denial of some benefit to innocent persons. When the beneficiary of affirmative action has suffered a wrong, the victim's entitlement to a remedy weighs against the third party's interest in not being burdened by a racial classification. Thus, a "narrow tailoring" of remedies to victims is one method of protecting those adversely affected by affirmative action. It is not, however, the only method.

In their refashioning of the narrow tailoring requirement, *Sheet Metal Workers* and *Paradise* provide an alternative. Third party interests can be protected by ensuring that a race conscious remedy is not used when the remedial goals can be accomplished as effectively with racially neutral remedies, by requiring that affirmative action remedies be flexible and of limited duration, and by attention to the nature and distribution of the burdens on third parties. Under *Sheet Metal Workers* and *Paradise*, these forms of narrow tailoring are constitutionally adequate when affirmative action is directed to the *structural* effects of past discrimination without regard to whether *any* of the beneficiaries are victims. They should also be adequate when Congress, the body with the most comprehensive remedial authority, seeks to remedy the effects manifested in the victims of discrimination.

Consideration of both the affirmative action and enforcement clause cases suggests that Congress has a remedial power sufficiently broad to make significant progress toward the achievement of equal opportunity in higher education. Its power, under the enforcement clauses, to develop remedies for the effects of past educational discrimination is indisputable. That power clearly extends to discrimination more broadly based than that of specific actors. It also includes the use of race conscious affirmative action. While the key case--*Fullilove*--is somewhat ambiguous, a compelling argument can be made that in employing affirmative action remedies Congress is not bound by an inflexible requirement of victim specificity.

V. Affirmative Action Policy and Implications of the Constitutional Constraints

The use of racially targeted policies is not, in itself, an assurance that racial equality will be achieved in higher education. The policy initiative outlined in Section A of this part is a tentative suggestion subject to modification, or rejection, after a more careful inquiry into the causes of inequality in higher education today. Section B of this part discusses more general policy implications of the constitutional constraints on the use of affirmative action. These implications apply to both the policy initiative suggested in Section A and to other affirmative action policy initiatives.

A. Affirmative Action to Achieve Equality In Higher Education

The most important characteristic of an effective affirmative action program is that it be designed to overcome the disabilities of discrimination so that minority students develop the skills necessary for success in higher education and beyond. Affirmative action that merely admits underprepared minority students into college is a temporary and illusory benefit. Rather than providing for the waiver or relaxation of college admissions requirements, an affirmative action program should ensure that minority students have the educational background deemed essential for success by institutions of higher education.

Consequently, an effective program must begin before college. The funding of four-year, college-preparatory programs specifically designed to meet the educational needs of minority students would be a starting point. The content of such programs should be developed jointly by public high schools (perhaps beginning with those having high concentrations of minority students) and state institutions of higher education. The involvement of the higher education community would take the form of high school curriculum development, summer instruction on the college campus, and continuing education for high school faculty involved in the program. Participation of state colleges would be encouraged by federal funding for the program *and* the conditioning of other federal aid to the colleges on the development of successful, cooperative programs.

Students who successfully complete the program would be assured admission into one or more of the state's four-year public colleges.

In addition, needy students would receive a package of state and federal financial aid adequate for them to meet the expenses of their higher education. The combination of assured admission and financial aid would provide students with strong incentives to complete the program. Institutions of higher education would also have a stake in the success of the program. The incentives of federal funding, commitment of state financial aid resources, and the assured admission feature should help convert public colleges from passive recipients of applicants into active educators of qualified minority students.

Involvement of the federal bureaucracy would not extend to the educational content of the program. High schools and colleges would have substantial flexibility in devising their cooperative programs and experimentation would be encouraged. Federal funding incentives would be tied to the actual successes of a program, not to the predications of the federal bureaucracy as to whether a proposed program will succeed.

If the model of cooperative, affirmative action programs proves effective, it could be expanded to include other elements of a state's system of public education. For example, cooperation between four-year colleges and community colleges might be used, or cooperation between undergraduate schools and graduate or professional schools. In each instance, the level of public education to which students go after completing the program would have a significant stake in the success of the program and a significant role in achieving success. The responsibility for remedying the effects of past discrimination and moving toward racial equality would be shared by each part of the system of public education.

B. Implications of the Constitutional Constraints On Affirmative Action

In developing any affirmative action policy to remedy the effects of racial discrimination in education, there are several concerns that should be considered by the administration and the Congress to ensure that the affirmative action remedy survives constitutional challenge. For simplicity of discussion, these will be examined in terms of affirmative action targeted on blacks. The discussion, however, would apply to remedies benefiting other minority groups as well.

1. Findings and the Legislative Record

In *Fullilove* the majority was perhaps excessively tolerant of a poor legislative record supporting the decision to enact an affirmative action remedy. It is not clear that the current Court would be equally tolerant, and it is clear that a better developed record would likely yield more effective remedial legislation.

The legislative record should include relevant information concerning inequality of opportunity in higher education today and the history of past discrimination creating that inequality.

This should include information concerning the intergenerational effects of educational inequality. To what extent, for example, is the current population of college students drawn from families in which parents are college graduates or are professionals? If parental education and professional status influence college enrollment, then past denial of educational opportunity can have a continuing effect on the achievement of equality today. Congress should inquire into how the effects of past discrimination manifest themselves in the potential pool of black college students. Congressional conclusions as to the continuing effects of past discrimination will determine the nature and scope of the remedy for those effects.

The undertaking of a thorough inquiry into the effects of past discrimination and their influence on equality in higher education today should not be an empty exercise designed only to satisfy some formalistic constitutional requirement.

Development of a complete legislative record is an educational process that can marshall political support for remedial affirmative action. Clearly establishing the record of past discrimination, and a continuing need for remedying its effects, also contributes to a belief that the affirmative action program is fundamentally fair and not simply the result of a political trade-off among interest groups. Faith in the fairness of a remedy makes burdens on the racial majority more tolerable. Perhaps most importantly, careful consideration of the need for remedial action contributes to the development of a more effective remedy.

2. Duration of an Affirmative Action Remedy

Judicial concern for the duration of affirmative action has focused primarily on the burden on innocent third parties. That concern is legitimate, both in terms of the constitutionality and political acceptability of affirmative action. The duration of the remedy, however, also implicates the issue of its effectiveness. Successfully remedying the legacy of racial discrimination is a delicate and difficult task. No remedy can be undertaken with full confidence that it will succeed or that its benefits will always outweigh its costs. Periodic evaluation of a remedy serves not only the dictates of the Constitution, but also considerations of sound policy.

Thus, legislation creating an affirmative action remedy should provide for regular evaluation and reporting to Congress. This function might be performed by the Office for Civil Rights in the Department of Education, a revitalized Commission on Civil Rights, or a presidentially appointed Commission on Equality in Education. Evaluation and reporting should include consideration of both the effectiveness of the legislative program in remedying the effects of discrimination and the impact of the program on third parties. Periodic evaluation by these means, and through legislative hearings, will provide Congress with the information it needs to decide whether the affirmative action remedy should be terminated, modified, or replaced.

3. The Burden on Third Parties

The affirmative action cases have generally viewed the displacement of third parties from benefits they have already acquired as an unacceptable result of affirmative action, but found the denial of a new benefit to be a more acceptable burden. This distinction, developed in the employment context, has led some members of the Court to accept affirmative action in hiring but reject it in the context of layoffs.

In *Wygant*, the plurality opinion extended the distinction into the context of college admissions. In dicta, Justice Powell distinguished between the denial of admission to some white students and the displacement of students who have already been admitted. In the former, the burden of an affirmative action program is diffused over the entire population of applicants and does not necessarily foreclose all opportunities for higher education.[33]

Further reduction of the burden could be accomplished through federal funding for affirmative action that is granted with the stipulation that it not displace existing expenditures by recipient institutions. To the extent that affirmative action takes the form of educational remediation, the burden on innocent whites can be reduced by ensuring that the programs are integrated and therefore available to both white and black students. The burden on innocent third parties can be further reduced by narrowing the class of beneficiaries for an affirmative action program.

4. Increasing Victim Specificity.

As suggested earlier, the affirmative action cases establish that victim specificity is not a constitutionally essential element of valid affirmative action. Nevertheless, several considerations support greater victim specificity where feasible. First, the more narrowly targeted the affirmative action program, the fewer the occasions for burdening innocent third parties. Second, the financial costs of affirmative action are reduced by narrow targeting. Third, a more carefully targeted program is more likely to reach those most in need of remedial action. Finally, if a racial classification is the sole means of targeting, the broad inclusion of nonvictim members of the targeted racial group may stigmatize the racial group. The concern is that broadly based affirmative action implies that even nonvictims in the racial group are unable to succeed without the racial preference.

To promote both judicial and political acceptance of an affirmative action program, further narrowing should be made within racial classifications where other characteristics indicative of victimization are available. Justice Harlan's opinion in *Gaston County* provides an appropriate means for determining when further narrowing would not unduly constrain the remedial powers of Congress: the characteristics used to narrow the class of beneficiaries should be "susceptible of speedy, objective, and incontrovertible determination" and should not significantly restrict the effectiveness of the remedy.[36]

In the context of affirmative action in higher education, the selection of additional characteristics to define subgroups of beneficiaries, within the victimized racial classes, will depend on the particular findings made by Congress and the particular remedies used. Several possibilities susceptible of speedy, objective and incontrovertible determination are available. Within the beneficiary class of black students, for example, the remedy could be more narrowly targeted by consideration of family income, segregation in pre-college schooling, education in resource-poor school districts, and/or parental educational level. Incorporating these or other techniques for tailoring an affirmative action remedy would reduce the burden on innocent third parties, protect against stigmatization, lower the financial cost of the remedy, and provide some assurance that the dollars spent are reaching those most suffering from the continuing effects of past discrimination.

Concurring in *Fullilove*, Justice Powell observed:

> In the history of this Court and this country, few questions have been more divisive than those arising from governmental action taken on the basis of race. . . . At least since the decision in *Brown v. Board of Education*, . . . the Court has been resolute in its dedication to the principle that the Constitution envisions a Nation where race is irrelevant. The time cannot come too soon when no governmental decision will be based upon immutable characteristics of pigmentation or origin. But in our quest to achieve a society free from racial classification, we cannot ignore the claims of those who still suffer from the effects of identifiable discrimination.[37]

In the past decade, the Court has been somewhat ambiguous in its definition of the constitutional doctrine applicable to affirmative action remedies. Nevertheless, the restraint on congressional action to address the legacy of more than a century of educational inequality is more political than constitutional. What has been lacking in recent years is the political will to take the next, necessary steps toward racial equality. If a new administration, and the Congress, can muster the political will to enact a carefully crafted program of affirmative action in higher education, the Constitution presents no insurmountable barriers to its use.

ENDNOTES:

Chapter VIII

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1. The historical review presented in this Part is based on Kujovich, *Equal Opportunity in Higher Education and the Black Public College: The Era of Separate But Equal*, 72 Minn. L. Rev. 29 (1987).
2. *Id.* at 144.
3. *University of California Regents v. Bakke*, 438 U.S. 265 (1978) The Court actually made two decisions concerning the use of race in an admissions program: (1) that the Davis program was invalid and (2) that race may constitutionally be one of many factors in an admissions process seeking to create a diverse student body. Both determinations were by a 5-4 vote and Justice Powell was the only Justice in both majorities. The remainder of the Court was divided into two groups of four. The first group (Brennan, Marshall, White, and Blackmun) joined Justice Brennan's opinion holding that the Davis program did not violate the equal protection clause or federal civil rights laws (and therefore agreeing that race can be a factor in achieving diversity). The second group (Stevens, Stewart, Burger, and Rehnquist) offered no opinion on the constitutional question, but in an opinion by Justice Stevens concluded that the Davis program violated Title VI of the 1964 Civil Rights Act. These four Justices thus combined with Justice Powell to invalidate the Davis program.
4. 478 U.S. 421 (1986).
5. 107 S. Ct. 1053 (1987)
6. As is true of all the Court's affirmative action cases, within the majority of five Justices there were differing views on the reasoning supporting the judgment. In *Sheet Metal Workers* Justice Brennan wrote for a plurality of four (Brennan, Marshall, Blackmun, and Stevens) while Justice Powell wrote a separate, concurring opinion. In *Paradise* Justice Brennan again wrote for a slightly different plurality (Brennan, Marshall, Blackmun, and Powell) while Justice Stevens wrote a separate, concurring opinion.
7. In addition to the justification described in the text, the Court also endorsed affirmative action to achieve a statistical goal for the purpose of assisting a court faced with a recalcitrant defendant unwilling to comply with orders to cease discriminating. Under this justification, the affirmative action goal affords an approximation of the result of a nondiscriminatory process where the defendant refuses to adopt such a process. Thus, the district court has some assurance that the selection (of union members, state troopers, or college students) is made without racial discrimination and a benchmark against which progress can be easily measured. Although it may be an important remedial tool in specific cases, the "benchmark" affirmative action quota depends on a defendant that refuses to cease unlawful discrimination. It is therefore of limited use to justify more generally based affirmative action programs.
8. As suggested by the plurality in *Sheet Metal Workers*: Affirmative action "promptly operates to change the outward and visible signs of yesterday's racial distinctions and thus, to provide an impetus to the process of dismantling the barriers, psychological or otherwise, erected by past practices." 478 U.S. at 450, quoting *NAACP v. Allen*, 493 F.2d 614, 621 (5th Cir. 1974)
9. In *Paradise* the absence of blacks at ranks above entry level were among "the effects of the Department's past discriminatory actions and of its failure to develop a [nondiscriminatory] promotion procedure." 107 S. Ct. at 1066, n. 20.
10. *Sheet Metal Workers v. EEOC*, 478 U.S. 421, 474 (1986).
11. *United States v. Paradise*, 107 S.Ct. 1053, 1067 (1987).
12. 438 U.S. at 307.
13. 476 U.S. 267 (1986).
14. 476 U.S. at 276.
15. *Id.* at 274. As in all of the Court's affirmative action cases, there were differences among the five Justices forming a majority for the Court's judgment. Justice Powell's pronouncements on "societal discrimination" were expressly adopted only by Chief Justice Burger, Justice Rehnquist, and Justice O'Connor (*id.* at 288). Justice White, the fifth member of the majority, wrote a brief concurring opinion that did not discuss the issue.

16. While these cases usually involved the enforcement clause (section 2) of the Fifteenth Amendment, the approach developed in them would also apply to the enforcement clause (section 5) of the Fourteenth Amendment. The language of the two clauses is nearly identical, the Court has treated as coextensive the enforcement powers of the two amendments, and some of the Voting Rights Act cases relied on section 5 of the Fourteenth Amendment to determine the validity of the Act's provisions. *See, City of Rome v. United States*, 446 U.S. 156, 207-208, n. 1 (1980) (Rehnquist, J., dissenting).
17. The 1965 Act covered any state or political subdivision which used a "test or device" (including both literacy tests and other requirements of educational achievement) and in which less than 50% of voting-aged residents were registered or had voted in the last presidential election. Covered jurisdictions could bail out by establishing in a declaratory judgment action that the tests and devices had not been used during the previous five years to abridge the right to vote on racial grounds. *See, South Carolina v. Katzenbach*, 383 U.S. 301, 317-318 (1966)
18. *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45 (1959)
19. *South Carolina v. Katzenbach*, 383 U.S. 301, 334 (1966).
20. 395 U.S. 285, 297 (1969).
21. *Id.* at 293, n. 9.
22. *Oregon v. Mitchell*, 400 U.S. 112, 233 (1970) (Opinion of Brennan, J.).
23. *Id.* at 233.
24. *Id.* at 284 (Stewart, J., concurring and dissenting).
25. *Id.*
26. 448 U.S. 448 (1980).
27. An MBE was a business of which at least 51% was owned by minorities. Eligible minorities were Blacks, Hispanics, Orientals, Indians, Eskimos, and Aleuts. 448 U.S. at 454.
28. Justice Marshall, joined by Justices Brennan and Blackmun, relied on the approach of Justice Brennan's *Bakke* opinion. Chief Justice Burger, joined by Justices White and Powell, agreed that the statute was constitutional but declined to choose between the Powell or Brennan approaches in *Bakke*, holding that under either approach the statute was valid. Justice Powell also wrote a concurring opinion purporting to apply his *Bakke* approach.
29. The statute itself did not include findings of past discrimination and the statute's legislative history was rather sparse. Thus, the findings of past discrimination were derived from comments during the floor debate and from legislative reports concerning a similar set aside program administered by the Small Business Administration. These different sources of legislative history included references to past discrimination such as: "'historic practices that have precluded minority businesses for effective participation in public contracting opportunities'"; "'past discriminatory practices [that] have, to some degree, adversely affected our present economic system'"; and "'a business system which is racially neutral on its face, but because of past overt social and economic discrimination is presently operating, in effect, to perpetuate these past inequities'." 448 U.S. at 461, 465, 466, n. 48.
30. 448 U.S. at 528, 530,n. 12. (Stewart, J., dissenting).
31. To conclude that Congress has the power to remedy "societal discrimination" does not necessarily empower the legislature to employ affirmative action based on vague assumptions about general discrimination in society. It would be fully consistent with the enforcement clause power, and the cases interpreting it, to require that Congress articulate the particular type of discrimination it seeks to remedy. There is, for example, a significant distinction between a general legislative finding that there has been discrimination in society and a determination that widespread and longlasting discrimination in education justifies a federal remedy targeted on the victimized class. It is the latter model that has been followed in most remedies under the enforcement clauses and that provides ample authority for further remedial action to address the effects of inequality in education.

32. Exactly what Congress sought to accomplish is not completely clear. The legislative history of the statute and the *Fullilove* opinions are somewhat unclear on the effects Congress perceived. The most complete statement on this issue is found in Chief Justice Burger's summary of a Civil Rights Commission report on the participation of minorities and women in government contracting:

    "Among the major difficulties confronting minority businesses were deficiencies in working capital, inability to meet bonding requirements, disabilities caused by an inadequate 'track record,' lack of awareness of bidding opportunities, unfamiliarity with bidding procedures, preselection before the formal advertising process, and the exercise of discretion by government procurement officers to disfavor minority businesses." 448 U.S. at 467.

33. *Id.* at 541, n. 13.
34. *Id.* at 483.
35. *Wygant v. Jackson Bd. Educ.*, 476 U.S. 267, 283 & n. 11 (1986) (Opinion of Powell, J.).
36. *Gaston County v. United States*, 395 U.S. 285, 292 (1969).
37. 448 U.S. at 516.

CHAPTER VI

Minority Access to Higher Education

by John Silard

I. Introduction

Higher education was originally established in the United States for the advanced education of the few. In time, with the adoption of the Land Grant system and the opening of state colleges, it became recognized that there was a broad public interest in the availability of post-secondary schooling. Over the past forty years it has become clear that the earnings and employment opportunities once gained by the high school diploma now require a college degree. In an ever more complex and technological society, college graduation is a minimum requirement for pursuit of meaningful employment at adequately remunerated levels.

The modern day significance of higher education is symbolized by dramatic changes in the numbers of colleges and the students they enroll. The number of institutions has doubled over the past forty years[1] and their student population has grown from 2.4 million to 12 million.[2] The college enrollment rate of 18-24 year olds has risen from 11 percent to nearly 30 percent today.[3] It is also noteworthy that some eighty percent of college students attend public rather than private institutions.[4]

Minority group enrollment ratios in college should be viewed in the context of high school graduation differences. Only about 75 percent of our young people graduate from high school.[5] Black and Hispanic students drop out of school at greater rates than do whites--23 and 40 percent, compared with white dropout of 8 percent.[6] Among high school graduates, about half go on to enroll for some form of higher education either immediately or within a short period, and about half of those enrolled achieve graduation from a four-year college.[7] But minority group high school graduates are underparticipants--by factors as great as 4 to 1--in our higher education systems.

Thus, 1970s college enrollment data by race and national origin showed 36 percent of white males aged 18-19 enrolled but only 23 percent of blacks and 24 percent of Hispanics.[8] The comparable figures for females were 37 percent for whites, 27 percent for blacks and 21 percent among Spanish origin.[9] At ages 20-21 the college enrollment differences were even greater: white males 31 percent, black 23 percent, and Spanish origin 13 percent; for females the figures were 26 percent, 23 percent and 14 percent in minority enrollment was heavily concentrated in two year non-degree institutions.[10]

College completion rates for minorities were even more depressed than enrollment. Four-year college completion data for 25-29 year olds showed white males graduating at 28 percent, blacks at 12 percent, and Hispanics at 7 percent rates.[11] Such sharp disparities in college completion were duplicated for females, with whites completing at 22 percent, blacks at 12 percent and Hispanics at 6 percent. That economics explains most of minority group underparticipation in higher education does not, of course, negate the racial factor. While poverty causes minority underparticipation, the number of minorities in low-income groups is itself the result of historical discrimination by society. Slavery, followed by segregation and persistent discrimination, are at the root of minority-group economic distress. One result of that distress is that minorities earn college degrees at a fraction of the rate for majority-group students.

These minority participation disparities are largely a function of socio-economic differences; minority group students are clustered in low-income families, and their lower college participation rates reflect the generally far lower college participation of the poor.[12] Thus, in the college enrollment rate of black males, there is nearly a one to two difference between lowest and highest economic groupings.[13] Indeed, at low-income levels blacks are actually college-enrolled and graduate at a *greater* proportion than whites.[14]

The 1970s minorities college disadvantages continue today. For a period in the 1970s, gains were being made by minorities in college enrollment and completion. But between 1976 and 1985, in a shift the American Council on Education has found "alarming," there was a one-fourth *decline* in the rate of college entry by minority-group high school graduates.[15] Thus, in the 1980s there has been a turnback leaving unimproved the two-to-one and even four-to-one underparticipation rates. It appears that after a slight improvement, the rate of college enrollment by black high school graduates has again diminished, leaving a result no better than a decade ago. Reflecting 1970s gains, in 1981 the proportion of black high school graduates 18 to 24-years-old enrolled in college was 28 percent and for Hispanics it was 29.8 percent.[16] But by 1985 the rates had declined for both groups to 26 percent[17] compared to 34 percent for whites--a disparity not significantly different from a decade earlier.

Moreover, there is also no reduction in the severe graduation rate differences, which strongly reflect the overconcentration of minorities in community colleges that do not grant bachelor's degrees. Thus, in four-year colleges, where blacks were 8.5 percent of all students enrolled in 1978, they were only 6.2 percent of those who received degrees in 1981.[18] The college degree attainment of majority- and minority-groups among 1980 high school seniors showed whites earned degrees at a rate of 20.2 percent, blacks at 10 percent, and Hispanics at 6.8 percent.[19] These disparate ratios are similar to those a decade earlier--whites 23 percent, blacks 12 percent, and Hispanics 7 percent.[20] Such inequalities mean loss of college opportunity for vast numbers of minority youth; for each high school graduating class in the nation, minority-group college underparticipation deprives hundreds of thousands of black and Hispanic students.

There are significant deprivations in our society for the individual who does not attend college and earn a degree. The most obvious is in lifetime earnings. As already noted, the college degree today yields no more than the employment and earning power of the high school diploma of forty years ago. The baccalaureate opens doors to far better remunerated and more rewarding employment. A decade ago, the median income of males with only a high school education ($11,940) increased by some $4,000 per year ($16,673) for those with four years of college.[21] Currently the college degree has even greater earning power. In 1985 males aged 25-34, with four years of college, earned nearly $9,000 more per year than high school graduates; males aged 35-44 earned over $10,000 more; and those aged 45-54 earned $13,000 more annually.[22] A difference of thousands of dollars a year in earnings for college graduates becomes cumulatively significant over a lifetime.[23]

Minority-group high school graduates, who must forego higher education, lose not just in lifetime earnings but also in the quality of life and personal rewards of their work. It requires no documentation to demonstrate that there are limited personal rewards from the menial, clerical, and physical labor jobs that today remain open for noncollege graduates. The far greater range of occupations for which college graduates qualify represents an important lifetime value.

Finally, there are also personal benefits that flow from college education; difficult to quantify, they nevertheless mean an enriched life. Attending college appears to enhance intellectual development of the individual,[24] and to have a positive effect on family life, also benefiting spouses and children.[25] College education appears to facilitate the individual formation or strengthening of identity and the discovery of talents, interests, values, and aspirations.[26] College-educated individuals appear happier and more satisfied with jobs and family lives.[27]

There is thus loss of several kinds for the large number of minority-group young persons who forego higher education and its benefits. Are their losses inevitable and irreparable? The major causes and cures for minority underparticipation are the focus of the succeeding analysis. It is suggested that there are remedies available, through federal and state action, that could greatly reduce unequal minority opportunity in higher education.

First, I consider the underpreparation for college of minority students in elementary and high schools, calling for special recruitment and academic preparation measures in public schools and in community colleges. Second, I examine financial impediments to college participation for low-income minority group members.

I. Minority Underparticipation: Causes and Cures

Minority underparticipation in college is a "pipeline" phenomenon, reflected progressively in lower rates of entry, of four-year college enrollment, and of college graduation. Thus, the data indicates[28] that beginning with cohorts of 100 high school students, only 72 blacks, 55 Hispanics and 55 Puerto Ricans graduate from high school, compared with 83 white students; thereafter 29 blacks, 22 Hispanics, and 25 Puerto Ricans enroll in institutions of higher education, compared with 38 whites; ultimately only 12 blacks, 7 Hispanics, and 7 Puerto Ricans complete college, compared with 23 whites.[29]

These depressed rates of minority-group enrollment and graduation are rooted in the inadequacies and inequalities of our basic public education systems--much of the problem facing minority college students "occurs prior to higher education, at the elementary and secondary levels" and is beyond the control of higher education.[30] The factor that "best explains minority underrepresentation" in higher education fields "is the poor academic preparation that minority students receive at the pre-collegiate level".[31] "Practices that discriminate against the poor and minorities in elementary and secondary education produce a need for postsecondary programs that address the underpreparation of those who are disadvantaged . . . we need to examine and evaluate the present condition of elementary and secondary schools".[32]

Underpreparation of minority group lower-income children commences with earliest days, when they first arrive at school with measurable learning unreadiness, requiring prompt diagnostic and remedial resources. Learning unreadiness results from the deprivations of a poverty-level upbringing that limit capacities of speech and comprehension. Absence of instructional toys, books, and other learning tools; frequent disruption of attention and concentration in crowded living conditions, and absence of health care to correct learning-impairing conditions are among the burdens of ghetto life. Other factors are the absence of family role-models who have achieved educationally; the limitations of single-parenting; the inability of the parent to provide educational support (often because the parent may not have been educated).[33]

Such conditions mean learning unreadiness that requires extra school resources, yet minority children are usually denied the needed help. They are mostly concentrated either in poor rural districts operating with impoverished school budgets, or in districts in large cities beset by extra municipal and school costs that inhibit them from offering equal education. Inferior school quality is the lot of most of the nation's minority children, and thus the children with the *greatest* schooling needs are systematically the recipients of inferior public education. The result of this mismatch is that many minority children drop out of school, and many who do finish manifest lower self-esteem, lower scholastic ambition, and lack of college aspirations.[34] As recently observed:

> Minority high school students are likely to live in and attend school in poor districts were less money is spent for students; where teachers are the least experienced and sometimes the least prepared; and where guidance counselors are in scarce supply. Those black, Hispanic, and American Indian students who do persist through high school are less likely to be in a college preparatory program. They spend fewer years studying academic subjects, take fewer years of science and mathematics courses, and are less likely to take the SAT or ACT exams.[35]

Elimination of minority underparticipation in higher education would be most advanced by reforms in elementary and secondary schooling, affording disadvantaged children a better and more equal learning opportunity. But higher education equality for minorities cannot await public school reform. I propose in the following sections special recruitment and preparation programs targeted for the nation's high schools and community colleges.

A. Recruitment in High Schools

Colleges throughout the United States have used a variety of means to encourage elementary- and secondary-school students to prepare and apply for college enrollment. Although no overall analytical assessment has been made, many of these programs clearly appear successful in attracting minority and low-income students to a college program. In a recently published handbook the American Council on Education (ACE) lists successful programs at various college locations and identifies their principal components.[36] Innovative measures have been taken by some colleges for the same purposes. Syracuse University, for example, has a plan to guarantee admission to all eighth graders in the city who complete a designated program and meet specified standards.[37] Summer transition and enrichment programs are an increasingly utilized method to attract minority students, some as early as in the eighth grade; frequently these programs are at the college campus and familiarize students with what they might expect of a college environment and program.[38]

The largest effort to reach disadvantaged students with support for college aspirations has been operating for a quarter century with federal funds. Upward Bound is the Department of Education program that provides information, counseling, tutoring, and support to children in grades nine through twelve who meet the general eligibility requirements--family taxable income less than 150 percent of the poverty level, and neither parent a college graduate. The population of Upward Bound participants (and sister projects Talent Search, Special Projects, and Educational Opportunity Centers) is 41 percent black, 17 percent Hispanic, 4 percent American Indian, 3 percent Asian American, and 35 percent white.[39]

Federal grants for Upward Bound programs go to over four hundred operating organizations, at a current annual cost of some seventy million dollars, yielding over two thousand dollars for each participant's support. Usually operated by colleges on their campuses, Upward Bound provides special instruction in reading, writing, math, and other necessary college subjects, academic and financial counseling, tutorial services, information on postsecondary opportunities, as well as student financial assistance, help in completing college admission tests and applications, and exposure to a range of career options where disadvantaged persons may currently be underrepresented.

The purpose of this federal program is well served for the 30,000 students who can participate under current federal funding, for it appears to overcome minority-group disadvantage in college enrollment and graduation rates. Thus, a study by the Research Triangle Institute found 91 percent of Upward Bound graduates entering institutions of higher education, and found them twice as likely to enroll in four-year colleges as students of similar backgrounds who have not had the benefit of the Upward Bound program.[40]

Four years after high school graduation, Upward Bound graduates were found to be *four times as likely* to have earned a college degree as students of similar background who had not had Upward Bound help.[41] Recently, a study at the University of Maryland, of Upward Bound students five years after their college entry, found that 65 to 68 percent of them had received degrees or were still in college, as compared to only 40 to 44 percent of the general incoming college population, and only 27 percent of a group similar in socioeconomic background to the Upward Bound students.[42] These remarkable statistics are matched by a recent study of college retention funded by the Department of Education and conducted by the Systems Development Corporation. It established that college freshman who had received the counseling, tutoring, and basic skills instructions associated with Upward Bound and its sister programs, were 2.6 percent more likely to complete their first year of college as the other students enrolled in the same schools.[43]

The Upward Bound program, now a quarter century in operation, has been closely monitored for cost and efficiency. Its remarkable success, under the aegis of hundreds of participating colleges, suggests that the time has come for a major expansion of the program beyond the limited number of disadvantaged students who now enjoy its benefits. The population of needy young persons who could qualify for Upward Bound support, under the present eligibility standards, is at least ten times as large as the 30,000 current participants. Without suggesting that Upward Bound be universalized, it nevertheless seems appropriate to suggest a ten-fold increase in its federal funding. At a cost of $700 million a year, some 300,000 young persons--many from minority backgrounds--could have the benefits of a program that has proved educationally so effective in opening the college door for minorities.

B. Recruitment in Community Colleges

Throughout the nation, minority college students are enrolled in disproportionate numbers in community colleges, few of whom go on to four-year degree programs. Obstacles to transfer of community college students to the baccalaureate program are found in a variety of transfer limitations, and curriculum mismatches between two- and four-year public colleges. They largely reflect elitism of the senior institutions, making them at best indifferent, and at worst hostile to reforms that would encourage minority students from community colleges to transfer up to the four-year institutions.

The elitist attitude at the degree-granting colleges reflects, in part, the reality that, as currently constituted, they are superior in funding and in the scope and quality of their offering. One measure of their quality is the fact that state universities spend some 60 percent more per student than do two-year state colleges.[44] Similarly, they spend 50 percent more per student on libraries than do two-year colleges, and in funded research they spend 150 times as much per student.[45] Taking salary as one measure of faculty quality, average faculty pay at public universities is 38 percent higher than at community colleges.[46]

A recent study concluded that "university administrators and faculty saw community colleges as overly protective" and "injurious to transfer students who needed to be self-directed and self-disciplined in order to succeed in the university environment."[47] They saw community college faculty as offering "watered-down courses" lacking in scope and depth,[48] voiced the feeling that the quality of community college students is too low, and challenged grading practices at community colleges.[49]

Given these sentiments, it is not surprising that student transfer rates from community colleges remain so low. As one study commission recently reported, transfer processes between institutions remain erratic or nonexistent:

> Coordinated curricula and equivalent competencies between college and university courses remain exceptions, not the rule. University course equivalencies, requirements, and support services remain arcane mysteries to 'junior level' community college transfers because many baccalaureate degree granting institutions focus orientation programs on their freshman students.[50]

The recommendation most often voiced for reform, calls for improved interaction between universities and community colleges. Suggested measures include "clear-cut statements on transfer policy, visits by program representatives to improve advising for potential majors, closer working relationships between university counselors and their community college counterparts, faculty exchanges, and direct and continuing feedback on the performance of transfer students."[51] Faculty exchanges have been widely identified as the "most promising strategy for reducing transfer barriers."[52] Reflecting the need to enhance minority-student transfers it has been suggested that two- and four-year schools should "work closely together to provide opportunities for trouble-free transfer. This objective can be promoted through defining institutional mission in ways that limit competition, and through establishing explicit responsibilities for cooperation".[53]

Minority students at community colleges have shown a desire for post-high school education, but they are inhibited from upward mobility by transfer barriers that result from ways that states have defined and structured their two- and four-year college programs. Enlargement of opportunity for minority students to transfer to schools granting degrees, calls for reforms in state higher-education systems. Lowering the barriers will require changes in school programs, course content, admissions tests, and the like. Given the demonstrated resistance of four-year institutions, eased transfer will likely require intervention of the state's highest public officers, and school officials, to assure improved interaction between sister institutions.

C. Improved Financial Assistance

An additional impediment to equal higher education participation for minority groups arises from the costs of college, particularly burdensome to the low-income families among whom minority groups are highly concentrated. Data from a National Longtitudinal Study in the 1970s showed that costs were the most significant reason black students gave for foregoing college entry or for withdrawing after enrollment.[54] Forty-five percent of black students and 40 percent of low-income students listed costs as the prohibitive factor in their decision not to apply to college--as compared to 32 percent of whites and 30 percent of high income students.[55] And, 41.17 percent of the black students gave costs as their chief reason for withdrawing from college.[56]

Since these data were published there has been no improvement, for college costs have increased. In the 1980s college tuition has grown by 9.8 percent a year, twice the inflation rate (4.9 percent), and substantially faster than income growth (6.5 percent). At public colleges, where most students are enrolled and where minorities are heavily concentrated, from 1980 to 1987 the four-year schools' tuition and fees increases have been at an annual rate of 10 percent.[57] As a result, the average annual cost to attend a public four-year institution, (including tuition and fees, room and board, transportation, and expenses), is now $5,789.[58] An annual college expense of nearly six thousand dollars is entirely beyond the reach of minority-group families who depend for an entire year on a $10,000 income, and it is also beyond the reach of lower-income families generally.

That the poor might not be able to have the benefit of higher education in the United States, was the concern reflected in the federal adoption in 1972 of the Pell Grants system of direct need-based financial aid for college students. College students from poor families have been greatly dependent on Pell awards. Thus at one group of colleges, statistics show that low-income students depend largely on Pell Grants, with 99 percent of those from families earning annually less than $10,000 receiving aid.[59] The recipients use the awards to cover 50.7 percent of their total school costs.[60]

Pell Grant reductions have been severe in the Reagan era and have most affected the poor and minorities. Thus, between 1975 and 1985, Pell

Grant aid in constant dollars declined by 62 percent.[61] From the 1979 to the 1984 school years, the purchasing power of Pell Grants received by the students attending black colleges declined by 37.3 percent.[62] While the maximum Pell amount (reserved for poorest applicants) was increased substantially between 1976 and 1986, in inflation adjusted dollars it actually declined by almost 20 percent.[63] Measured against the rising costs of college, grant aid to students declined significantly. By 1982-83 the dollar value of the Pell Grant declined down to about 30 percent of student costs at public universities--one-third less than four years earlier.[64] With Pell grants now providing less than half of college costs for needy students, it is clear this federal program is not opening wide the doors of college opportunity for minorities and the poor, as it had once been hoped it would. As two scholars have recently concluded, the program has become "less effective over time as a means for providing access for college, as increased funding for the program has not resulted in larger awards in real terms for the lowest income students attending college".[65]

Nor has the federal college loan program championed by the Reagan administration filled the gap for the poor. On the contrary, it appears that it is the college hopes of the poor that have been most damaged by the shift over the past eight years from a poverty-specific and need-based Pell program to a middle-class oriented loan system. A low-income applicant, who receives even a maximum Pell Grant, now faces compelling need for a loan program to cover his costs. With Pell Grants only meeting between 30 percent and 50 percent of college costs, to yield a four-year college cost of some $24,000 a student at a public college will have to borrow thousands of dollars to complete his schooling. A $9,500 projection was recently made as the post- college debt burden of a low-income student who has to meet costs without the benefit of family resources.[66]

It is hardly surprising that an 18-year-old black high school graduate would be reluctant to borrow ten thousand dollars for college when that is the amount his family has in order to meet its expenses for an entire year. Thus, the "increasing emphasis on loans rather than grants" during the past years has been seen as adversely affecting "low-income students and thus many minorities in higher education".[67] That is also the conclusion of another observer who notes that, under the new federal policy of shift from grants to loans, whereas in 1975-76 college grant aid was 80 percent of total federal assistance by 1984-85 it had declined to 46 percent.[68] Similarly, whereas at black colleges federal school aid in 1979 had constituted 53 percent of all financial aid to students, it had dropped to 37 percent by 1984-85, while federal student loans had increased from 8 percent of financial assistance to 30 percent.[69]

The shift from direct aid to high-cost college loans has impacted most on minority and poverty students. As may be expected, lower-income students "are more influenced by trends in college prices than students from higher income groups . . . low-income students have to spend a higher proportion of their income on subsistence purchases and therefore have less available for educational expenses.[70] The shift from aid to loans may have affected the extent to which overall aid was a stimulus to low-income enrollment."[71] With the proportion of student aid in the form of grants now decreased from 77 to 50 percent of all federal and state aid, there is reason to believe that the relatively low participation rates of low-income students reflect at least in part the money barrier.[72]

A 1986 survey of nearly 300,000 college freshmen bears out these conclusions. Commenting on the survey results, study director Astin noted that "changes in federal aid eligibility regulations have contributed to a steady decline in the proportion of freshmen participating in the Pell Grant program and rapidly rising dependence on loans".[73] Astin notes the affects of the federal reductions "on the decisions of poor students to attend college." Associate Director Green similarly commented that "recent changes in federal aid eligibility seems to have affected the college-going decisions of large numbers of students from low- and middle-income families".[74]

In sum, in the 1980s there has been a simultaneous reduction in the value of federal education grants, rise of college tuition burdens, burgeoning of the federal loan program--which commits students to heavy debt after college, and sharp declines in college entry and graduation by minority and low-income students. Whatever are the virtues of the federal loan program for the middle class, for the poor it is by no means an adequate replacement for the grant concept so important to college participation for minority groups. I urge, at the federal level, that the Pell program be restored to its original force, and that grant maximums for low-income students be adequate to permit them to attend four-year colleges without the need to borrow money. At the state level, tuition fees are now becoming substantial considerations for the poor who do not have the funds to meet such costs. A sliding-scale tuition plan should be initiated at state college, with low-income students entitled to attend free of charge.

ENDNOTES

Chapter IX

1. Bane & Wilson, *Equality in Higher Education*, 1980 p.2.
2. *Id*, p.3 *updated*.
3. *Id*.
4. *Id*.
5. *Id*.
6. Washington Post, August 30, 1988, p.21.
7. Bane and Wilson, p.24, *updated*.
8. *Id*, p.26.
9. *Id*.
10. Even for those enrolled in four year college programs there was major disadvantage within the system. A comprehensive identification of minority student enrollment in the prestigious "flagship" universities found underparticipation deemed "severe" in extent (Astin, *Minorities in American Higher Education* Jossey-Bass, 1982, p.138). Blacks, for instance, were found underrepresented in proportion to their overall college enrollment at 56 of 65 flagship universities (*id*, at 133).
11. Bane and Wilson p.28.
12. Among the 18.9 percent of 1980 high school seniors who later attained a bachelors degree, rates of degree receipt for low-middle, high-middle and highest students were respectively 6.9 percent, 11.3 percent, 21 percent and 39.3 percent, a five to one spread (Department of Education, Center for Education Statistics, Tabulation from High School and Beyond Survey).
13. Bane and Wilson, p.34.
14. *Id*; Hauptman and McLaughlin, *Is the Goal of Access to Postsecondary Education Being Met?* Aspen Institute 1988, Table 5.
15. *Education Week*, November 4, 1987, p.5.
16. Taylor, *Trends in Federal Policy Affecting Minority Participation in Higher Education* (unpublished manuscript prepared for Harvard University, 1987) p.6.
17. Spence, *The Minority Presence in Higher Education*, (unpublished manuscript prepared for Harvard University, 1987), p.3.
18. Spence, p.5.
19. Department of Education, Center for Education Statistics, Longtitudinal Studies Branch, *Highest Degree Attainment by 1980 High School Seniors*, 1987.
20. Astin, *Minorities in American Higher Education*, Jossey-Bass 1982, p.175.
21. Bane and Wilson, p.9.
22. Source: Bureau of the Census, P60, No. 156 (Aug. 1987), pp. 131-35.
23. Thus, blacks with a high school diploma, the census shows, earn an average of $9,000 a year, while those with the Bachelor's degree earn nearly $17,000 (*Chronicle of Higher Education*, Oct. 14, 1987.
24. Bane and Wilson, p.17.
25. *Id*, p.16.
26. *Id*, p.18.
27. *Id*, p.18.
28. *Equality Postponed*, p.82.

29. A major factor in the minorities drop from college enrollment to college graduation is the heavy concentration of minorities in two year community colleges. Thus, of Hispanic college students in California 85 percent are enrolled in community college (*id* at 80). In urban community colleges minorities represent 64.8 percent of all students enrolled (*Minorities in Urban Community Colleges*, American Association of Community and Junior colleges, 1987, p.12) --a seven fold over-concentration of minority students who represent about 10 percent of college enrollment (Astin, p.38).
30. *Equality Postponed*, p.108.
31. *Id*, p.113.
32. *Id*, vii.
33. Observing that upper middle class children average approximately four more years of schooling than children from lower status family background (Thomas, *Black Students in Higher Education* (1981) pp. 50-51, it has been noted that "the largest portion of that variance "derives from the fact that middle and upper class parents are able to provide their offspring with the type of skills, values and cultural and social experiences that schools value and subsequently reward." Similarly, among the strongest predictors of high school performance by students, (which is strongly linked with their prospects of college entry and completion) are such elements as parental income and parental education (Astin, pp. 94-95).
34. Wilson & Justiz, *Minorities in Higher Education*, Educational Record, (1987-1988) p.13.
35. Teachers and counselors may well determine students' college prospects by their role in decisions about grades, track placement and similar pre-college factors (Bane and Wilson, p.60). If teachers do not regard minority students as potential achievers, students are unlikely to become college material. It has therefore been urged that schools with low-income and minority students "set high expectations for those students' academic success and to act on the belief that such students can perform at high levels and meet rigorous high school graduation standards" (*Equality Postponed*, vii).
36. *Minorities on Campus: A Handbook for Enhancing Diversity*, (Washington, D.C. American Council on Education, 1989). In order to expand the pool of students who undertake college programs, the ACE handbook urges the need for a recruiting plan with numerical goals and timetables; suggests the need to work cooperatively with public schools to correct the conditions that inhibit many of their students; urges assessment instruments to help students to identify academic weaknesses and improve achievement at all levels before college; and suggests adaptation of junior high and high school curricula to college entry requirements, as well as provision of early information on college for junior and high school students.
37. Wilson & Justiz
38. New York Times, Section 4A, August 7, 1988, p.20.
39. *NCEOA Journal*, Volume 2 Issue 2, September 1987, p.4.
40. Burkheimer, Riccobono and Wisenbaker, *Evaluation Study of the Upward Bound Program, A Second Followup*, Research Triangle Park, N.C., Research Triangle Institute, 1979.
41. *Id*.
42. *NCEOA Journal*, 1987, p. 7.
43. *Id*. The high utility of appropriate pre-college intervention is also confirmed by recent operations of the privately funded "I Have a Dream" foundation. It provides a daily presence in the schools of trained persons who give help, tutoring, enrichment trips, and other supports for inner city children. In 1988 the first class of seventh graders in New York City who got foundation help, beginning in 1981, showed a remarkable high school graduation rate of 90 percent and 50 percent have chosen to go on to college.
44. Astin, p.142.
45. *Id*.
46. *Id*. at 145.
47. Richardson and Bender, *Fostering Minority Access and Achievement in Higher Education: The Role of Urban Community Colleges and Universities*, Jossey-Bass 1987, p.36.
48. *Id*.
49. *Id*. at 178-179.

50. *Minorities in Urban Community Colleges*, p.21.
51. Richardson and Bender, p. 181.
52. *Id.* at 83.
53. *Id.* at 216; It has been recommended that community colleges revitalize their transfer function by establishing a "transfer-college-within-a-college," wherein all students preparing for a baccalaureate can be brought together and exposed to the same kinds of intensive educational and extracurricular experiences commonly available to students at residential institutions" (*Equality Postponed*, 122).
54. Jackson, How Students Pay for College, *Higher Education*, Vol. 9, No. 5, September 1980.
55. National Longitudinal Study of High School Class of 1972, 1976, Questions 24 and 38.
56. Jackson, *supra*.
57. ACE Newsletter, *Higher Education and National Affairs*, February 23, 1987.
58. *A Call For Clarity; Income, Loans, Cost*, American Association of State Colleges and Universities, 1988 p.17.
59. Kirschner and Thrift, *Access to College: The Impact of Federal Financial Aid Policies at Private Historically Black Colleges*, United Negro College Fund, Inc. p.16.
60. *Id.*
61. Mitchem, Preserving Educational Opportunities, *Point of View*, Congressional Black Caucus Foundation, Fall 1987, p.20.
62. Kirschner and Thrift, p.4.
63. Hauptman and McLaughlin, p.6.
64. Leslie and Brinkman, p.153.
65. Hauptman and McLaughlin, p.8.
66. Mitchem, p.21.
67. Spence, p.8.
68. Taylor, p.10.
69. Kirschner and Thrift, p.25.
70. Hauptman and McLaughlin, p.11.
71. Leslie and Brinkman, p.153.
72. *Id.*
73. ACE Cooperative Institutional Research Institute, *The American Freshman: National Norms for Fall 1986*. 74. As succinctly stated in a recent publication (Kirschner and Thrift, p.29) "because of the declining purchasing power of federal grants to low income students, students from the most needy families now must face large debt burdens in order to attend college. Often, students must assume debt larger than their families' annual income to pay college expenses. Understandably, some students see debt as an unacceptable risk, limiting their options for education...Examination of the demographic trends in American...points to a national policy of divestiture in the future of American youth. A renewed and greater investment in education is essential to assure an educated citizenry. Since about 1979, we have witnessed the implications of these trends. While a larger percentage of black and Hispanic youth are graduating from high school, their college going rate has declined sharply. If this trend continues we will be a less educated society in the year 2000."

LDF
NAACP LEGAL DEFENSE
AND EDUCATIONAL FUND, INC.

STATEMENT OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. OPPOSING THE POSITION OF THE OFFICE FOR CIVIL RIGHTS ON MINORITY TARGETED SCHOLARSHIPS

I.

INTRODUCTION

On December 4, 1990, the Office for Civil Rights of the United States Department of Education (OCR) announced by press release a new interpretation of Title VI of the Civil Rights Act of 1964 stating that the Act and implementing regulations prohibit "in most cases" minority targeted scholarships, but allow scholarships where race counts as a "positive factor" in eligibility. After substantial public criticism a new policy was announced via press release on December 18, 1990, superseding the old. Issued ostensibly under Title VI and implementing regulations, it absolutely prohibits private colleges and universities from administering minority targeted scholarships from their own funds. No exceptions are provided. Where such scholarships are funded entirely by private persons or entities that have specifically restricted the funds for this purpose, an institution may administer such scholarships. OCR stated that it was taking no administrative position on targeted scholarships funded entirely by state or local governments.

OCR's broad prohibition on minority targeted scholarships is legally insupportable. Such programs have been approved in a variety of contexts with the general constraint that they be a limited part of an institution's total financial aid

Contributions are deductible for U.S. income tax purposes.

The NAACP Legal Defense & Educational Fund, Inc. (LDF) is not part of the National Association for the Advancement of Colored People (NAACP) although LDF was founded by the NAACP and shares its commitment to equal rights. LDF has had for over 30 years a separate Board, program, staff, office and budget.

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program. Minority targeted scholarships are clearly permitted and often required as a desegregation remedy where a college or university has a history of prior discrimination or exclusion. Even in the absence of prior discrimination, minority targeted scholarships are appropriate where they promote the compelling state interest of educational diversity or address underrepresentation.

The particulars of OCR's "administrative policy" and the distinction that OCR seeks to set up between private university vs. outside funding is entirely specious, will not withstand legal scrutiny, and is irresponsible as educational policy.

At this point it is necessary and appropriate that OCR rescind the policy announced and reaffirm its existing policy interpretations and enforcement decisions that support equal educational opportunity and diversity through the positive use of minority scholarship programs.

II.

BACKGROUND

The crisis in minority higher education continues. Although the high school graduation rate of blacks (76.1%) now approaches that of whites (82.1%), disparities persist in every objective measure of African American college participation. While 38.8% of white 18 to 24 year old high school graduates were enrolled in college, only 30.8% of the African American group were. While 55.8% of white college students attained a baccalaureate degree after 5 1/2 years, only 30.3% of black students did. The proportion of bachelor's degrees received by blacks fell from 6.4% in 1976 to 5.7% in

1989, master's degrees from 6.8% to 4.6%, and doctorates from 3.3% to 2.4%. The absolute numbers fell as well. The percentage of professional degrees received by African Americans was virtually unchanged in the period (4.3% to 4.4%). Carter and Wilson, Ninth Annual Status Report, Minorities in Higher Education (American Council on Education, January 1991).

Financial aid is a key element in black enrollment and graduation at institutions of higher education. Fully 82% of black undergraduate students in private colleges received some financial assistance (grants, loans, work-study), as did 72% of all Hispanic undergraduates and 59% of all Asian American undergraduates. Richard Rosser, President, National Association of Independent Colleges and Universities, Statement before the House Committee on Education and Labor (December 19, 1990). With the dramatic rise in college tuition at public and private institutions and a decline in the dollar value of federal financial assistance -- especially grant assistance -- scholarships are critical to increasing participation rates of minority students who because of persistent segregation and discrimination disproportionately comprise those in poor and low income families. Silard, Minority Access to Higher Education, One Nation, Indivisible: The Civil Rights Challenge for the 1990's (Citizens Commission on Civil Rights, 1989).

A survey conducted by the College Board in 1990 showed that 696, or twenty-four percent of the responding colleges and universities and at least nine states distribute some financial aid to minority students without regard to need. Twenty-seven percent of the responding colleges and universities or 785 and at least six states distributed some aid to minority students on the basis of both minority status and need. Pitsch, "Colleges Offer Data To Assess Scholarship Policy's Impact," Education Week, January 9, 1991, at 26. It is not known what percentage of total financial aid is specifically targeted for minorities; however, such targeted money is generally believed to be only a small percentage of total aid available. Despite these targeted scholarships, the most recent data show the gap between black and white college enrollments widening. Karentz, Lewis and DeSilets, Trends in the Postsecondary Enrollment of Minorities (Rand Corp. August 1990).

Many colleges have found minority targeted scholarships necessary to recruit and retain black students. According to the president of the American Council on Education,

> ACE and its member institutions believe based on extensive experience that scholarships and fellowships designated for minority students remain essential to providing minorities with meaningful access to higher education. Such programs are not so disproportionate as to render discriminatory financial aid programs as a whole. Within appropriate limits, the programs play an important role in focusing the attention of applicants as well as the institutions on the objectives of recruiting qualified minority students.

Letter from Robert H. Atwell to John H. Sununu (December 17, 1990).

In its so-called "administrative policy," OCR has ignored the very regulations it is legally bound to apply. In adopting minority scholarships, colleges and universities have been implementing duly promulgated regulations that enforce the Title VI requirement that federal support for educational institutions be nondiscriminatory. Title VI regulations recognize that an institution that receives federal funds "may take affirmative action to overcome the effects of conditions which resulted in limited participation by persons of a particular race, color, or national origin." 34 C.F.R. § 100.3(b)(6)(ii). The regulations also state that a college or university

> may properly give special consideration to race, color, or national origin to make the benefits of its program more widely available to such groups, not then being adequately served. For example, where a university is not adequately serving members of a particular racial or nationality group, it may establish special recruitment policies to make its programs better known and more readily available to such groups, and take other steps to provide that group with more adequate service.

34 C.F.R. § 100.5(i). After the Supreme Court decided Regents of the University of California v. Bakke, 438 U.S. 265 (1978), OCR "concluded that no changes in the regulations are required or desirable." OCR Affirmative Action Policy Interpretation (October 2, 1979), 44 Fed. Reg. 58,509 (45 C.F.R. Part 80). It specifically identified "increased recruitment in minority institutions and communities" and "preadmission compensatory and tutorial programs" as permissible race conscious techniques. Id.

Pursuant to these regulations and interpretation, OCR, in its administrative proceedings, has approved the use of minority targeted scholarships as a recruitment device specifically to achieve diversity and to overcome minority underrepresentation. On March 24, 1982, OCR upheld MIT's Minority Tuition Fellowship Program because Title VI regulations authorized universities to institute minority fellowships to overcome underrepresentation. OCR declined to extend the rationale of Bakke from admissions policies to all race conscious actions by universities on the ground that the denial of a particular form of financial aid will not have the same effect as a categorical denial of admission because alternative sources of funds often exist.

A year later, OCR upheld three minority targeted financial assistance fellowship programs administered by the University of Denver's Graduate School of Business and Public Management on the same grounds. One of the programs was federally funded and the two others privately funded. OCR found that: "The administration of the two privately financed fellowships . . . does not limit non-minority students from applying and qualifying for the major proportion of financial assistance administered by the school." OCR concluded that the school's program was "consistent with Title VI and with Bakke:"

> We do not believe that Bakke is controlling as to the award of student financial aid, as the decision addresses issues relating only to admissions. It is important to note the distinction between financial aid and admissions. It is our understanding that students are admitted to the University of Denver Graduate School of Business and Public Management according to ordinary criteria. The issue in this case is not one of exclusion from the school on the basis of race or national origin.

OCR Memorandum from J. Standlee to G. Roman (March 22, 1983); see also, for example, U.S. Department of Education, Office of the Assistant Secretary for Civil Rights, Letter of B. Taylor to unnamed complainant (March 24, 1982).

OCR's encouragement of minority targeted scholarships is consistent with congressional enactments funding a variety of race conscious and minority and gender targeted programs in colleges and universities. E.g., Minority Honors Training and

Industrial Assistance, 42 U.S.C. § 7141(d) (scholarship funding to needy minority honors students); Minority Access to Research Careers, 42 U.S.C. §§ 241, 285k and 288 (National Research Service Awards to students at colleges with a substantial enrollment of minority students); Minority Participation in Graduate Education, 20 U.S.C. § 1134 (program to provide grants to institutions to enable them to identify needy undergraduate students from minority groups underrepresented in graduate education); National Science Foundation, 42 U.S.C. § 1861 et seq. (variety of research scholarship programs for minority, women and physically disabled scientists and engineers, and for faculty at minority institutions and predominately undergraduate institutions); Patricia Roberts Harris Fellowships, 20 U.S.C. § 1134d-f (graduate and professional study fellowships awarded to institutions to support traditionally underrepresented women and minorities with financial need in graduate or professional programs); Indian Education Act, 25 U.S.C. § 2623 (scholarships for American Indians). See also Office of Management and Budget, Catalog of Federal Domestic Assistance 1990 at 203, 450-51, 556, 823, 832-33, 974, 1071, 1124. As recently as the month before OCR issued its press releases opposing minority scholarships, President Bush signed into law the Excellence in Mathematics, Science and Engineering Act, Public Law 101-589, which found that "women and minorities are significantly underrepresented in the fields of mathematics, science and engineering" and sought to increase their number by specifically targeting programs for women and minorities to enter these fields.

In addition, the Internal Revenue Service specifically permits tax-exempt organizations to maintain minority targeted scholarships and fellowships as long as the financial aid program as a whole is nondiscriminatory. Rev.Proc. 1975-50, 1975-2 C.B. 589.

Contrary to OCR's assumption that white applicants or students are adversely affected by targeted scholarships, it is generally believed that there is no adverse impact. First, according to the American Council on Education:

> [T]he availability of minority-directed financial aid [has not] denied nonminorities the assistance necessary to finance higher education. Typically, once an institution has made its admissions decisions, the institution determines the type of financial aid that may be offered to students requesting it. In accordance with the guidance from OCR and the Internal Revenue Service . . . , colleges and universities have targeted scholarship and fellowship funds for minorities in such a manner that the financial aid program as a whole remains nondiscriminatory.

Letter from Robert H. Atwell to John H. Sununu (December 17, 1990). Second, some colleges and universities guarantee financial assistance to all persons admitted who have financial need. In such cases, targeted scholarships necessarily have no exclusive effect. Third, it appears that minority students do not receive their expected share of non-targeted scholarships, which form the bulk of student aid. Cf. Sharif v. New York State Education Department, 709 F. Supp. 345 (S.D.N.Y. 1989) (court finding that women were disproportionately and improperly excluded from Regents and Empire State Scholarships by use of SAT scores as the sole criterion for selection would apply with equal force to minorities). Targeted scholarships, therefore, may often only act to neutralize or correct the discriminatory effect of other scholarships. Last, "[m]inority or gender-based scholarships do not establish or constitute a barrier. While scholarships may make it easier for minority students to attend a given institution, they guarantee neither entry to nor graduation from an institution." Rosser, supra page 3, at 10-11.

III.

MINORITY TARGETED SCHOLARSHIPS ARE APPROPRIATE, LEGAL AND NECESSARY

OCR's December 1990 position opposing minority targeted scholarships funded by private institutions in all cases is obviously over-inclusive because it prevents an institution from using targeted scholarships as a desegregation measure to overcome the effects of prior discrimination and as a measure to accomplish diversity and counter underrepresentation.

A. Minority Targeted Scholarships Are A Proper Remedy For Prior Segregation And Exclusion

For most of the nation's history African Americans were excluded from most higher education institutions by law, practice or custom. When blacks were admitted, financial support was often withheld from them and made available to whites only in the form of race-exclusive scholarships. Public and private higher education in the South, where most blacks resided, was segregated by law during the Jim Crow "separate but equal" era. See Berea College v. Kentucky, 211 U.S. 45 (1908) (private college required by state law to racially segregate students). Black schools, however, were separate but unequal; they in fact were grossly inferior. Both the federal government and state governments discriminated against black public and private colleges and universities in funding, in the award of Federal contracts and grants, and in the distribution of Federal resources. Title III, Higher Education Act of 1965, 20 U.S.C. § 1060 (congressional findings).

As late as 1940, seventy-seven percent of the nation's black population resided in the seventeen southern and border states and comprised twenty-two percent of the region's population. But the ten million blacks in the region received less than four percent of the federal land grant monies allocated to these segregationist states. Overall these black citizens were limited to colleges receiving just over five percent of total expenditures for public higher education. In eight states, accounting for forty percent of all blacks in the nation, there were no accredited public colleges available to black students. Kujovich, Equal Opportunity in Higher Education and the Black Public College: The Era of Separate But Equal, 72 Minn. L. Rev. 29, 98-101 (1987).

Graduate and professional education for blacks was simply not available in the south. Southern and border states provided scholarships to black graduate and professional students and required that they obtain their education outside of their home states in order to preserve the racially-exclusive admissions policies of white state universities. Id. at 116-20. Missouri, West Virginia, Maryland, Virginia, Tennessee, Kentucky, Oklahoma, Texas, North Carolina, Georgia, Alabama, Arkansas, Louisiana, and Mississippi maintained such scholarships. Id. Many of these states persisted in forcing their black graduate and professional students out-of-state through the use of scholarships even after the Supreme Court and state courts ruled that the schemes denied blacks equal educational opportunity. Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938); Pearson v. Murray, 169 Md. 478, 182 A. 590 (1936). For example, the states of Virginia and Louisiana persisted in sending black graduate and professional students out of state until the mid to late 1960's.

Just as financial assistance was used to support the edifice of de jure segregation, it has been used as a tool to dismantle segregated state institutions of higher education after the Supreme Court declared "separate but equal" schools violative of the Fourteenth Amendment, Brown v. Board of Education, 347 U.S. 483 (1954), and ordered their elimination "root and branch." Green v. County School Board, 391 U.S. 430 (1968) (educational authorities "clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch"). Racial exclusion by private colleges has also been held to be illegal. See Runyon v. McCrary, 427 U.S. 160 (1976).

Minority targeted scholarships for desegregation have been approved in lawsuits by the courts and in administrative enforcement actions by OCR. Indeed, OCR has stated that "[s]tudent financial aid programs based on race or national origin may be consistent with Title VI if the purpose of such aid is to overcome the effects of past discrimination," Memorandum to Presidents of Institutions of Higher Education

Participating in Federal Assistance Programs, Summary of Requirements of Title VI of the Civil Rights Act of 1964 for Institutions of Higher Education (June 1972).

Title VI regulations require that where "the recipient has previously discriminated against persons on the ground of race, color, or national origin, the recipient must take affirmative action to overcome the effects of prior discrimination." 34 C.F.R. § 100.3(b)(6)(i)(emphasis added). OCR's December 1990 letter to Fiesta Bowl officials, but not the press release, admitted that Title VI regulations permit a university to "adopt or participate in a race-exclusive financial aid program when mandated to do so by court or administrative order, corrective action plan, or settlement agreement." Letter of Michael Williams to John Junker (December 4, 1990). The December 18, 1990 policy does not by its terms approve minority targeted scholarships even in these circumstances.

Perhaps the clearest statement of the need for such programs was provided in Geier v. Alexander, 801 F.2d 799 (6th Cir. 1986), in which the United States Court of Appeals for the Sixth Circuit approved a settlement between black students and Lamar Alexander, then Governor of the State of Tennessee, providing that 75 black public college sophomores every year were to be selected for special programs and guaranteed admission to state professional schools upon completion of undergraduate work and the meeting of minimum admissions standards. The court found that adoption of an open admissions system had not removed the vestiges of de jure segregation or resulted in effective desegregation, necessitating the professional school program as a way to desegregate all-white professional schools. The court specifically rejected the claims of the United States Department of Justice that the race-specific professional school program was an illegal "racial quota," characterizing the program as an appropriate affirmative action remedy for past unlawful segregation. Geier, 801 F.2d at 804-06.

The use of race conscious remedies by education officials to eliminate the effects of prior segregation has been found proper even in the absence of any judicial or administrative findings of a constitutional violation. It is settled law that public educational officials may voluntarily institute race conscious remedies, such as a transportation plan that results in a similar racial composition in all schools, because desegregation measures "invariably" take account of race. McDaniel v. Barresi, 402 U.S. 39, 41 (1971). "Any other approach would freeze the status quo that is the very target of all desegregation processes." Id. OCR's requirement of court or administrative findings of prior discrimination is overly narrow and inconsistent with rulings of the Supreme Court. See Johnson v. Transportation Agency, Santa Clara County, 480 U.S., 616, 630 & n.8, 640-41 & n.17 (1987); Wygant v. Board of Education of Jackson, 476 U.S. 267, 289-91 (1986) (O'Connor, J. concurring in part and concurring in the judgment); see also Local Number 93 v. City of Cleveland, 478 U.S. 501, 522-23 (1986) (parties can agree to more than a court could order after trial on the merits).

The Supreme Court's more recent jurisprudence in cases such as City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989), which involved the question of whether an entity's record of prior discrimination is extensive enough to justify affirmative relief, does not apply when the record consists of de jure exclusion or segregation. A prior condition of de jure exclusion or segregation automatically justifies affirmative desegregation remedies. Keyes v. School District No. 1, 413 U.S. 189, 200 (1973) ("[W]here a dual system was compelled or authorized by statute at the time of our decision in Brown v. Board of Education . . . , the State automatically assumes an affirmative duty 'to effectuate a transition to a racially non-discriminatory school system' . . . that is, to eliminate from the schools within their school system 'all vestiges of state imposed segregation'" [citations omitted]). The Supreme Court also has sanctioned the use of racial set asides in employment discrimination cases to remedy "deeply rooted Fourteenth Amendment violations," United States v. Paradise, 480 U.S. 149, 185 (1987), as in cases of de jure segregation compelled by the force of law.

Thus, public or private higher education institutions that engaged in prior exclusion may utilize minority targeted scholarships as a desegregation device to overcome the vestiges of historic segregation. These measures are appropriate until such time as these vestiges have been eliminated. Such institutions include the institutions of the seventeen southern and border states which maintained de jure segregated public higher educational systems, including ironically the very two Fiesta Bowl schools that were the subject of OCR's initial announcement. The University of Alabama currently is being sued by the United States Department of Justice for its failure to make adequate efforts to desegregate. The University of Louisville currently operates under an OCR desegregation plan, a plan that itself includes racially targeted scholarships for blacks and whites. Separate schools were maintained not only in public and private schools in southern and border states, but in states such as Pennsylvania and Ohio as well.

Other states may justify minority targeted scholarships based on the state's overall history of discrimination in education. For example, there are many non de jure states with well documented histories of segregation and discrimination in elementary and secondary education -- practices that directly impede minority access to higher education. Minority targeted scholarships by such a state would be justified. Many private institutions also have histories of exclusionary practices as well. Thus, many colleges and universities, public and private, may provide minority targeted scholarships to overcome a history of discrimination.

Even in the absence of a showing of de jure segregation or intentional discrimination, Supreme Court rulings and Title VI regulations would support the use of minority targeted scholarships to address underrepresentation caused by practices that had the effect of limiting minority participation. See Swann v. Charlotte Mecklenburg Board of Education, 402 U.S. 1, 16 (1971) and North Carolina State Board of Education v. Swann, 402 U.S. 43, 45 (1971) (approving broad discretion by school authorities to seek some racial balance as a matter of educational policy); Guardians Association v. Civil Service Commission of N.Y.C., 463 U.S. 582, 608 (1983) (approving use of Title VI regulations to remedy practices that have the effect of excluding minorities).

The Supreme Court has approved voluntary affirmative action measures where past discrimination or current practices have resulted in continuing exclusion of minorities in a traditionally segregated field, see Johnson v. Transportation Agency, Santa Clara County, 480 U.S. 616, 632 (1987); id. at 656-57 (O'Connor, J., concurring in part and concurring in judgment); Steelworkers v. Weber, 443 U.S. 193, 198-99 (1979); see also City of Richmond v. Croson, 488 U.S. 469, 501-02 (1989).

Thus, where institutions have used admissions criteria or practices with inherent racial or cultural biases or recruitment mechanisms that limited or excluded participation by minority students, scholarships targeted at bringing in greater numbers of minority students would be appropriate. Or, where financial aid has been distributed in reliance on these same admissions criteria or, in a manner that disproportionately excludes minorities (e.g. children of alumni, students from specific geographic areas with little to no minorities), minority targeted scholarships tailored to address those limitations and/or to neutralize them are appropriate. Indeed, these are flexible measures which schools can use when needed to address a particular limitation -- unlike OCR's inflexible approach that would lock in these scholarships for all time by use of restrictive grants.

In Wygant, 476 U.S. 267, Justice O'Connor stated in her concurring opinion that "[t]his remedial purpose need not be accompanied by contemporaneous findings of actual discrimination to be accepted as legitimate as long as the public actor has a firm basis for believing that remedial action is required." Id. at 286. In Croson, the Court recognized the appropriate use of voluntary measures where there was a statistical disparity in the workforce compared to the relevant labor market, 488 U.S. at 502 (citing "Ohio Contractors Assn. v. Keip, 713 F.2d [167] at 171 [6th Cir. 1983] (relying on percentage of minority businesses in the State compared to percentage of state purchasing contracts awarded to minority firms in upholding set-aside)"). The Court's disapproval of the Richmond set-aside plan would not bar appropriately tailored minority targeted scholarship plans based upon similar justification. The Richmond Plan, in contrast, was struck down because the Court concluded that it was a "rigid" 30% set-aside not narrowly tailored to root out the effects of past discrimination because the City of Richmond had failed to demonstrate properly the discrimination in its construction industry and the number of qualified minority contractors in its market. In contrast, where institutions have tailored their minority scholarship programs to address underrepresentation of minorities on their campuses as compared with the particular "market" of high school graduates from which they draw students, the concerns of the Court in Croson would be satisfied.

In sum, institutions that have a history of segregation or exclusion or that have used practices that have the effect of limiting minority participation can legally develop and administer properly designed minority targeted scholarship programs.

B. Minority Targeted Scholarships Are Proper to Promote Student Body Diversity and to Address Underrepresentation

1. Minority targeted scholarships are a proper device to promote diversity, even in the absence of a history of prior exclusion or segregation, following Regents of the University of California v. Bakke, 438 U.S. 265 (1978). In Bakke, Justice Powell

found that the promotion of diversity was a "constitutionally permissible goal for an institution of higher education," 438 U.S. at 312, that justified the consideration of race in a university admissions program, consistent with Title VI, as long as race was used as a competitive factor or criterion and not the sole factor for admissions. Id. at 318. According to Justice Powell, such programs do not result in improper preference on account of race.

> The [majority-race] applicant who loses out on the last available seat to [a minority] candidate receiving a 'plus' on the basis of ethnic background will not have been foreclosed from all consideration for that seat simply because he was not the right color or had the wrong surname. . . . His qualifications would have been weighed fairly and competitively, and he would have no basis to complain of unequal treatment under the Fourteenth Amendment.

Id.

Four other justices agreed with Justice Powell that the competitive consideration of race was proper as a safe harbor approach because the "use of race to achieve an integrated student body is necessitated by the lingering effects of past [societal] discrimination." Id. at 326 n.1. These justices would have found even a set aside of admissions slots to minorities proper.

Just last term, the Supreme Court reiterated that "a 'diverse student body' contributing to a 'robust exchange of ideas' is a 'constitutionally permissible goal' on which a race-conscious university admissions program may be predicated." Metro Broadcasting, Inc. v. Federal Communications Commission, 111 L. Ed. 2d 445, 465 (1990) (citing Bakke, 438 U.S. at 311-13). Diversity has been recognized as central to the purpose of an educational institution and as serving important values protected by the First Amendment. Id.; Bakke, 438 U.S. at 311-13. It furthers a "compelling governmental interest," id., similar to the duty to desegregate.

There does not appear to be any post-Bakke case specifically dealing with minority scholarships. The only pre-Bakke reported opinion is Flanagan v. President and Directors of Georgetown College, 417 F. Supp. 377 (D.D.C. 1976), in which a district court found that a minority scholarship program violated Title VI. The case, however, was premised on a reading of Title VI as permitting only "racially neutral" affirmative action measures, arose in an atypical factual context, and its rationale was rejected in Bakke, which plainly permits consideration of race to promote educational diversity.

Bakke does not prohibit diversity-enhancing minority targeted scholarships. Financial aid decisions are usually made after admissions determinations. The underlying reason for competitive consideration of race, rather than a racial set aside, as articulated by Justice Powell, is the furtherance of broad "genuine diversity" as opposed to ethnic diversity alone. Bakke, 438 U.S. at 315 ("The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element. . . . [An] admissions program, focused solely on ethnic diversity, would hinder rather than further attainment of genuine diversity.") (original emphasis). Genuine diversity is achieved at the admissions stage with the admission of students that the university has determined are both qualified for the course of study and desirable in terms of their contribution to the university community. Having admitted a diverse group of students, it is unnecessary for a university to undertake a separate competitive consideration of race at the later aid stage.

At the financial aid stage, the university's decision-making is fairly restricted from the point of view of diversity. The objective is to effectuate the diversity reflected in the range of students admitted, which many universities achieve by targeted scholarships not only for minority students but for other diversity-enhancing groups, such as athletes and musicians, as well. Such targeted funds are designed to assure that a sufficient number of minority or other students actually matriculate so that the genuine diversity sought at the admissions stage is achieved in fact. At the financial aid stage, in short, it may be necessary to grant benefits on the targeted basis of race, as well as geography or academic, athletic or musical ability, in order to achieve genuine diversity. To do otherwise might actually distort or subvert the diversity achieved at the admissions stage. If, for instance, only individual student need were considered at the financial aid stage, the class that matriculates may have a very different profile than the class admitted.

Moreover, as OCR's administrative decisions construing the Title VI regulations make clear, the denial of financial aid does not have the severe consequences of the denial of admissions dealt with by Bakke. See supra pages 5-6 (MIT and University of Denver minority targeted scholarship programs upheld by OCR). Denial of consideration for a minority targeted scholarship does not inevitably mean that the student is denied a place at the college or university or that the student is denied financial aid. Following OCR and IRS guidance, a university must assure that minority targeted scholarships are only a limited part of their financial aid program as a whole. In addition, there are many non-institutional sources of financial assistance. OCR's conclusion that minority targeted scholarships are not precluded by Bakke because the effect of such scholarships is much different from a denial of admissions is supported by Justice Powell's plurality opinion in Wygant v. Jackson Board of Education, 476 U.S. 267, 283 & n.11 (1986). Justice Powell distinguished the burden caused by a lay-off and loss of an existing job from a "diffused" burden shared to a considerable extent among society generally such as implementing hiring goals. In the school admission context, Justice Powell in dicta differentiated the lesser burden presented by the denial of admission and the displacement of students already admitted. Id. Following that logic makes clear that financial aid is unlike admissions and that limited portions of such aid targeted to minority students in the context of much larger financial aid programs clearly pose at most a very minimal and diffused burden and are therefore justifiable to achieve the important goal of diversity.

2. Minority targeted scholarships may properly be used as a recruitment device to overcome minority underrepresentation in a student body outside of the desegregation context. See Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 16 (1971); North Carolina State Board of Education v. Swann, 402 U.S. 43, 45

(1971), "[S]chool authorities have wide discretion in formulating school policy, and . . . as a matter of education policy school authorities may well conclude that some kind of racial balance in the schools is desirable quite apart from any constitutional requirements." Id.

Consistent with the learning of the Swann cases, the Title VI regulations provide that "[e]ven in the absence of such prior discrimination, a recipient in administering a program may take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color, or national origin." 34 C.F.R. § 100.3(b)(6)(ii). OCR's policy interpretation following Bakke specifically provides that "[t]his is permitted even though the recipient has not itself discriminated against these groups." OCR Affirmative Action Policy Interpretation, supra page 5. The regulations also recognize that "where a university is not adequately serving members of a particular racial or nationality group, it may establish special recruitment policies to make its programs better known and more readily available to such groups." 34 C.F.R. § 100.5(i). These regulations, as noted above, have been specifically construed by OCR to approve the voluntary use of minority targeted scholarships by universities to address underrepresentation.

C. Minority Targeted Scholarships Are Necessary To Promote Diversity, Eliminate Underrepresentation or Remedy Past Discrimination

In Bakke, Justice Powell found that a racial set aside in admissions was unnecessary to achieve diversity because diversity could be better achieved through consideration of race as a factor. The experience of colleges and universities in the financial aid area, however, is distinctly different. In financial aid, consideration of a variety of factors "may prove ineffective, as well as inefficient from the standpoint of achieving maximum impact with limited resources," thus necessitating targeted scholarships.

> Consider efforts to support minority students pursuing Ph.D.'s in the arts and sciences -- where the lack of minority candidates is especially pronounced. (A total of just 13 black students earned doctorates in 1989 in the combined fields of mathematics, physics and astronomy.) Advanced fields of study require intensive, lengthy academic preparation; the cost of graduate education is far beyond the means of most minority students; and, consequently, large numbers of minority students never give serious consideration to pursuing such opportunities because the entire set of difficulties appears overwhelming.
>
> Programs that give extra consideration (on an "other things being equal" basis) to minority students are almost certain to be far less effective than programs designed to address the precise problem at hand. Emphasizing financial need, for example, is much less useful at the doctoral level, since almost all students are largely "independent" of their parents and virtually all can therefore demonstrate "need." Moreover, the objective of many programs is to encourage larger numbers of exceptionally talented minority students to pursue such opportunities, not just to enroll more economically or educationally disadvantaged minority students.
>
> More explicit targeting of financial-aid programs has obvious advantages: Greater visibility and clarity are achieved, a stronger "signal" is sent, and available funds can be invested with the maximum likelihood that they will achieve their true purpose. These considerations no doubt explain why major government-sponsored programs (e.g., certain fellowship programs of the National Science Foundation and the National Institutes of Health) have been explicitly reserved for minority students for many years.

Bowen and Rudenstine, "Colleges Must Have the Flexibility to Designate Financial Aid for Members of Minority Groups," The Chronicle of Higher Education, January 9, 1991, at B1, B3; see also Atwell supra page 4. With the increase in racial incidents on university campuses, Intimidation and Violence: Racial and Religious Bigotry in America at 8-9 (U.S. Commission on Civil Rights, September 1990), many institutions feel the need to have minority targeted scholarships to send a strong signal that minorities are welcome and that there is an institutional commitment to have minority students and to retain them.

IV.

OCR'S POLICY PROHIBITING MINORITY TARGETED SCHOLARSHIPS IS LEGALLY FLAWED

Under the legal authority set out above and for the reasons explained below, OCR's December 4 and December 18, 1990 policy statements on minority scholarships are patently flawed. Moreover, OCR, like any other federal agency, has no authority to promulgate "policy" by press release without the safeguards of agency rulemaking procedures or to make factual determinations without the concrete recordmaking of administrative adjudication.

OCR's initial press release of December 4, 1990 stated that "OCR has interpreted the law to prohibit, in most cases, race-exclusive scholarships," citing only 34 C.F.R. § 100.3(b)'s general prohibition of different or segregated program benefits on the basis of race, color or national origin. The press release failed to cite the more specific Title

VI regulations that OCR itself has construed to permit minority scholarships. See 34 C.F.R. § 100.3(b)(6)(ii). The press release ignored § 100.5(i) that contains an illustration of permissible voluntary affirmative action targeting "particular racial or nationality groups" using "special recruitment policies . . . and other steps to provide that group with more adequate service." 34 C.F.R. § 100.5(i). In the MIT administrative decision, OCR indicated that those adequate services under the law could include "special financial assistance."

Given the historic discrimination at the universities of Alabama and Louisville, as well as the Bakke legal analysis discussed above, however, OCR was clearly wrong to suggest that these institutions could not have minority targeted scholarships. OCR's initial statement is at the very least disingenuous in failing to acknowledge that it was a marked departure from OCR's own longstanding regulations, administrative rulings, and policy interpretations, which plainly have encouraged universities to adopt minority scholarship programs to enforce the guarantees of Title VI.

OCR's subsequent issuance on December 18th was incoherent as well as wrong. It sought to announce an "administrative policy," notwithstanding the existence of conflicting case law, governing regulations and administrative interpretations. With respect to the substance of the administrative policy, the document begins by initially declaring that: "The Administration fully endorses voluntary affirmative action in higher education, and encourages educational opportunities for minority and disadvantaged students." Such a general declaration, while welcome, can be -- and is -- undercut by specific elements of the "policy."

OCR states that it will enforce Title VI regulations "in such a way as to permit universities receiving federal funds to administer [minority targeted] scholarships established and funded entirely by private persons or entities," but that "private universities receiving federal funds may not fund race-exclusive scholarships with their own funds." This policy will have a devastating effect on minority scholarships since 61.5% of all scholarship funds at public and private institutions come from unrestricted funds. Rosser, supra page 3, at 5. The legal basis for the distinction between privately-funded and university-funded scholarships where both are administered by a university is presumably the fact that Title VI only covers the universities as recipients of federal funds, but not private donors. But where the university administers the scholarships, that distinction is contrary to OCR's own inclusive definition of financial assistance contained in its 1972 Summary of Title VI Requirements. It is contrary to the Title VI regulations which provide:

> the services, financial aid, or other benefits provided under a program receiving Federal financial assistance shall be deemed to include any service, financial aid, or other benefits provided in or through a facility provided with the aid of Federal financial assistance.

34 C.F.R. § 100.3(b)(4) (emphasis added). It is contrary to the December 4th statement that university participation and administration of such scholarships made outside private donor funds subject to Title VI. It ignores and conflicts with Title VI itself as amended

by the Civil Rights Restoration Act, 42 U.S.C. § 2000d-4a, which provides that Title VI covers all of the operations of a covered program or activity if any part of that program receives federal financial assistance. Even under the narrow decision in Grove City College v. Bell, 465 U.S. 555, 573-74 (1984), the student financial aid program as a whole remained subject to federal civil rights statutes.

OCR's analysis is simply flawed in its assertion that minority targeted scholarships funded by state and local governments cannot be addressed administratively because they are covered by Supreme Court decisions. Since OCR's inception it has been applying Title VI and applicable constitutional principles to both public and private schools and school systems that receive federal financial assistance. By definition, any institution, public or private, that receives federal financial assistance is covered by Title VI and subject to OCR's jurisdiction. OCR does not -- and cannot -- explain how it suddenly has become divested of jurisdiction over public institutions on this one issue. Furthermore, OCR has apparently misrepresented its position. Shortly after announcing that state and local government scholarships could not be addressed administratively, it became public that OCR was preparing to rule that an Oregon tuition waiver program targeted at underrepresented blacks, Hispanics and American Indians (Asians and Asian Americans were not underrepresented) was illegal. Jaschik, "New Federal Challenge to Programs for Minorities Seen in Education Dept. Memo on Oregon Plan," The Chronicle of Higher Education, January 16, 1991, at A1.

Finally, the impractical effect of OCR's administrative policy demonstrates its bankruptcy.

> [OCR] has stated from the beginning that the penalty would be a loss of all federal funds for the college or university involved. It will certainly seem at least highly peculiar to many people if a college can use federal moneys for racially targeted scholarships, whereas if it chooses to use its own general funds for the very same purpose, it then loses all federal support -- including, presumably, the federal funds designated for race-specific scholarships.

Bowen and Rudenstine, supra page 23, at B3.

V.

CONCLUSION

A university may voluntarily utilize appropriately tailored minority targeted scholarships to overcome the vestiges of discriminatory exclusion or segregation as permitted by Geier and the school desegregation decisions and to correct for practices that have had the effect of limiting participation by minorities, supra section III.A. Where there is no record of prior discrimination, Bakke, Metro Broadcasting and OCR's Title VI regulations are clear that a university may take such affirmative action to effectuate diversity and overcome underrepresentation, supra section III.B. OCR's December 1990 policy statements should be rescinded.

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12/90

News from The College Board

FOR IMMEDIATE RELEASE

COLLEGE BOARD RELEASES DATA ON MINORITY-SPECIFIC SCHOLARSHIPS

In response to the increasing public interest in the U.S. Department of Education's new policy on minority scholarships, Donald M. Stewart, president of the College Board, today released detailed data about the number and types of colleges that grant such awards, and their annual growth since 1987-88, the first year for which data are available.

The data from the Board's Annual Survey of Colleges show that between 1987-88 and 1990-91, (1) institutions reporting minority grants or scholarships without reference to financial need rose from 15 percent to 24 percent of all responding institutions (see Table A), and (2) those institutions that considered minority status in need-based scholarships rose from 16 percent to 27 percent of all responding institutions (see Table B).

"The steady increase in the use of minority-specific scholarships, both with and without regard to need, underscores the sensitivity of this issue," Mr. Stewart said. "It also emphasizes the importance of making clear to minority students that until this unfortunate controversy is resolved, they should not be discouraged from pursuing their dreams of higher education because they think there is no financial assistance."

(more)

He said that the College Board will soon undertake an additional survey to obtain more information from colleges on the number of students and amount of funding associated with minority-specific scholarships and grants.

"Through bitter experience, the College Board has learned over the years that even the discussion of reducing financial aid for college-bound students creates in them the impression that financial aid has in fact been reduced," said Mr. Stewart. "That impresssion in turn discourages them and they do not seek the aid they need--aid that in fact is there for them--but resign themselves to abandoning a dream."

The College Board is a nonprofit association serving students, schools, and colleges through programs designed to expand educational opportunity. Its members are more than 2,500 secondary and higher education institutions and schools, systems, and associations.

###

TABLE A
INSTITUTIONS REPORTING GRANTS/SCHOLARSHIPS BASED ON MINORITY STATUS WITHOUT REFERENCE TO NEED*

Academic		Two-year		Four-year	
year	Total	Pub.	Priv.	Pub.	Priv.
1987-88	439 (15%)**	106 (12%)	8 (3%)	174 (32%)	151 (13%)
1988-89	527 (18%)	128 (14%)	10 (4%)	216 (39%)	173 (15%)
1989-90	589 (21%)	138 (18%)	5 (2%)	248 (45%)	198 (16%)
1990-91	696 (24%)	176 (20%)	12 (4%)	279 (50%)	229 (19%)

TABLE B
INSTITUTIONS REPORTING GRANTS/SCHOLARSHIPS BASED ON MINORITY STATUS PLUS NEED*

Academic		Two-year		Four-year	
year	Total	Pub.	Priv.	Pub.	Priv.
1987-88	467 (16%)	124 (14%)	13 (5%)	159 (29%)	171 (15%)
1988-89	567 (20%)	143 (16%)	13 (5%)	189 (34%)	222 (19%)
1989-90	642 (23%)	157 (20%)	13 (6%)	212 (38%)	260 (17%)
1990-91	785 (27%)	212 (24%)	18 (6%)	241 (43%)	314 (26%)

---

*Note: Do not total the numbers from Tables A and B. Some institutions have both need-based and non-need-based minority grants/scholarships.

**Percent of responding universe within particular segment. Although number in responding universe varies from year to year, there was at least an overall 90% response rate each year.

Source: Annual Survey of Colleges, 1987, 1988, 1989, 1990. Copyright (c) 1990 by the College Entrance Examination Board. All rights reserved.

[redacted]

MINORITY SCHOLARSHIPS

THE NUMBERS BEHIND THE POLITICS

A survey of more than 2,800 two-year and four-year institutions of higher learning showed that in the current academic year, 1990-91, 27 percent of them offered scholarships to minorities based on need and 24 percent had scholarships for minorities in which need was not a criterion.

The number of schools offering minority scholarships has risen sharply since 1987-88. The Education Department sparked controversy earlier this month when Assistant Secretary Michael L. Williams ruled that colleges receiving federal funds could not reserve scholarships for minority students, a ruling that was partly reversed last week.

COLLEGES WITH MINORITY SCHOLARSHIPS BASED ON NEED

Academic Year	Total	Public	Private
1987-88	467 (16%)	283	184
1988-89	567 (20%)	332	235
1989-90	642 (23%)	369	273
1990-91	785 (27%)	453	332

COLLEGES WITH MINORITY SCHOLARSHIPS NOT BASED ON NEED

Academic Year	Total	Public	Private
1987-88	439 (15%)	280	159
1988-89	527 (18%)	344	183
1989-90	589 (21%)	386	203
1990-91	696 (24%)	455	241

NOTE: Some institutions have both types of minority scholarships. Many others offer scholarships for which minority students qualify.

SOURCE: Annual Survey of Colleges, The College Board

THE WASHINGTON POST

TRENDS IN COLLEGE-GOING RATES BY AGE, RACE, AND GENDER

1976 - 1989

Prepared for the
Association of Urban Universities

by
Carol Frances + Associates
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Warrenton, Virginia 22186

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TRENDS IN COLLEGE-GOING RATES

BY AGE, RACE, AND GENDER

1976 - 1989

Information about trends in college-going rates is vital to an assessment of the impact of student financial aid on broadening access to educational opportunities for disadvantaged students. This information is also valuable to policy discussions of the role of race-specific scholarships and fellowships.

Access to higher education is an enduring concern of the uurban universities. The urban universities are also in the middle of the current controversy about race-specific scholarships and fellowships. Because of the value of information about college-going rates in addressing these concerns of the AUU members, AUU requested an analysis of trends in college-going rates by age, race, and gender.

This detailed analysis of trends in college-going rates leads to two basic conclusions:

1. For virtually all age groups, and for both men and women, the percentage of the white majority population which is enrolled in college is significantly greater than the percentage of the Black and Hispanic minority populations.

2. The gap between the majority and minority rates has widened for almost all age and gender groups, over the period from 1976 to 1989.

Additional findings are:

3. The gap between the majority and the minority college-going rates is largest, and is increasing at the fastest pace, for the 18 and 19 year-olds.

4. Women have higher college-going rates than men in the age group first entering college (18-19), and in the older age-group returning to college (30-34). Men have higher college-going rates than women in all the age groups in between (20-21, 22-24, and 25-29).

5. While the college-going rates for the traditional college-age groups (18-19, 20-21, and 22-24), for all race and gender groups combined, are increasing, the rates for the older age groups (25-29 and 30-34) are decreasing.

The data for this trend analysis were obtained from issues of the Current Population Survey, Series P-20, published by the Census Bureau.

The college-going rate is the percentage of a specified population group which is enrolled in college. College-going rates are charted by race in this report for twelve population groups. The twelve population groups encompass six age groups (16-17, 18-19, 20-21, 22-24, 25-29, and 30-34) each for men and for women.

The college-going data by race and gender are subject to considerable variability from year-to-year because the national estimates are derived by the Bureau of the Census from weighted responses to sample surveys of households, and some of the age-race-gender groups in the sample are comparatively small. Generalizations about trends in college-going rates are thus more solid if they are based on a data for a number of years, not just two or three years.

The data are charted here in two different ways. The first set of charts are standard plots showing the reported college-going rate for each age-race-gender group for each year. The second set shows exactly the same data but, instead of connecting the data points year-by-year, a calculated trend line that best describes the direction of change over the 14-year period is fitted through the same data points.

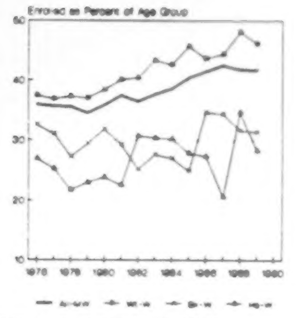
Using College-Going Rates as Measures of Progress Toward Greater Educational Access and Equity

Increases in minority enrollment in recent years, reversing declines in enrollment for some groups, have been cited as evidence of progress toward creating greater educational opportunity for minority men and women.

While increases in minority enrollment are encouraging, a truer measure of progress toward greater access would be increases in the college-going rate. In many cases, minority enrollment has increased, but minority population has increased even more, resulting in declining college-going rates.

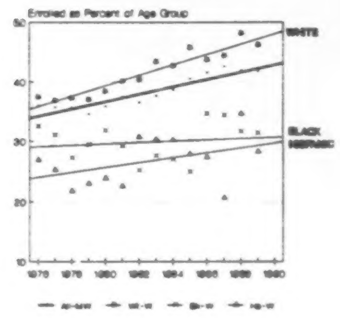
Further, an increase in the college-going rate of minority men and women is not a sign of greater educational equity if, over the same period, the college-going rate of the white majority has increased even more, thus widening the gap between the majority and minority students.

Measured against the goal of greater equity in access to opportunities for a college education, there has been very little progress over the last decade and a half in reducing the disparities in college-going rates between the majority and the minority groups. For virtually all twelve of the age and gender groups, the gap between the majority and the minority college-going rate has actually widened over the years from 1976 to 1989.

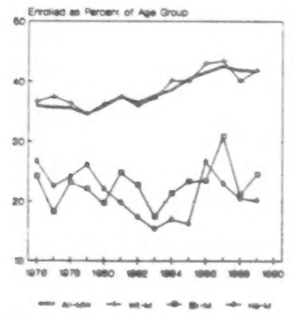


WOMEN, AGE 18-19

Source: Bureau of the Census, CPR P-20

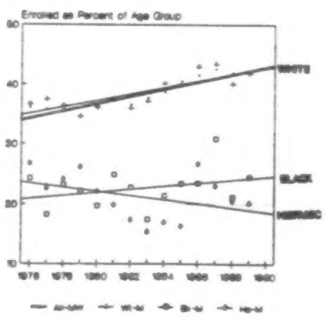


WOMEN, AGE 18-19



MEN, AGE 18-19

Source: Bureau of the Census, CPR P-20



MEN, AGE 18-19

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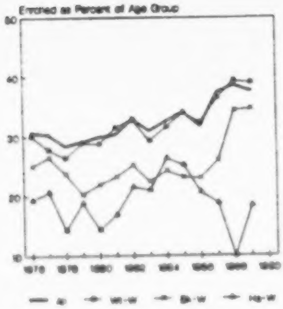
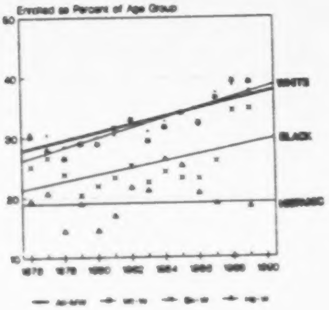
WOMEN, AGE 20-21

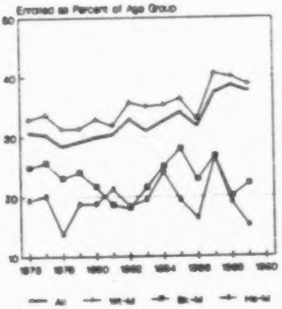


Source: Bureau of the Census, CPR P-20

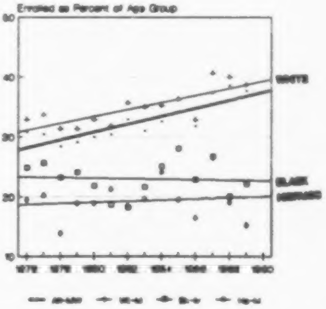
WOMEN, AGE 20-21



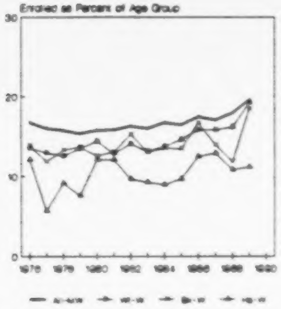
MEN, AGE 20-21



MEN, AGE 20-21

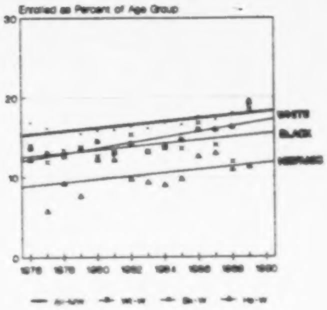


WOMAN, AGE 22-24

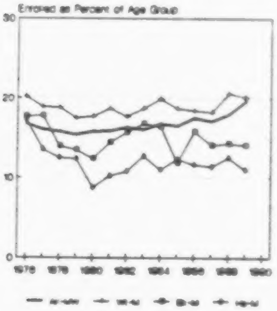


Source: Bureau of the Census, CPR P-20

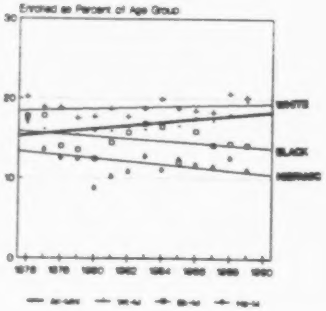
WOMEN, AGE 22-24



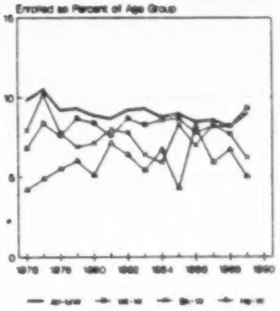
MEN, AGE 22-24



MEN, AGE 22-24



WOMEN, AGE 25-29



Source: Bureau of the Census, CPR P-20

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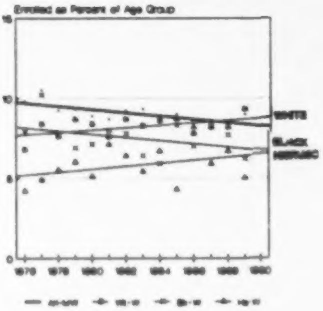
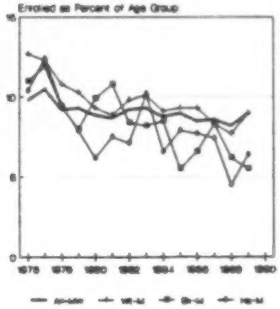
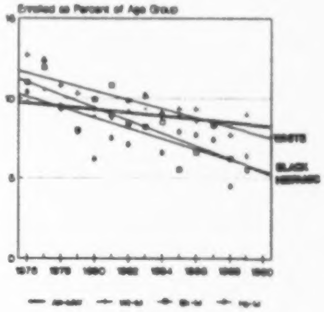
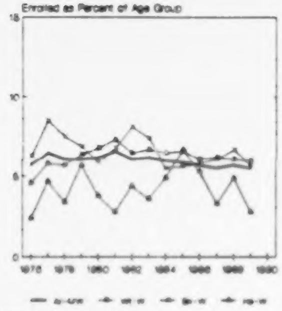


MEN, AGE 25-29



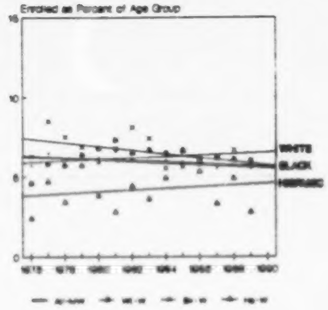
MEN, AGE 25-29



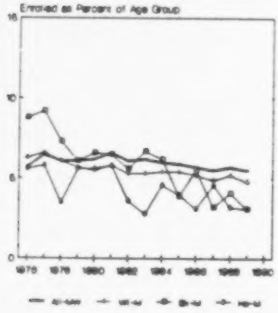


WOMEN, AGE 30-34

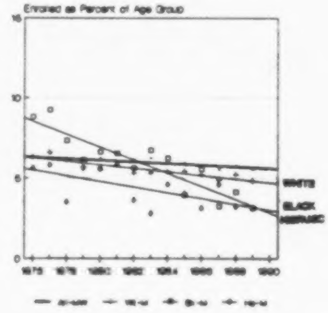
Source: Bureau of the Census, CPR P-20



WOMEN, AGE 30-34

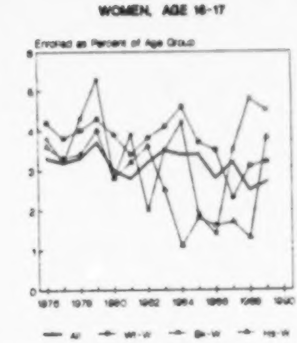


MEN, AGE 30-34



MEN, AGE 30-34

TRENDS IN COLLEGE-GOING RATES
BY AGE, RACE, AND GENDER



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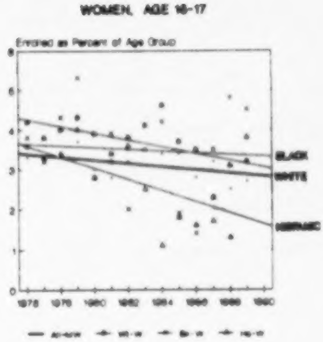
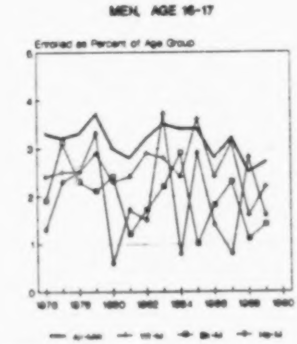
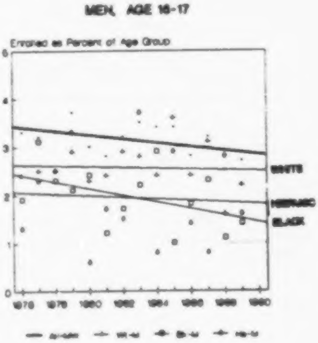




Source: Bureau of the Census, CPR P-20



COLLEGE-GOING RATES

BY AGE, RACE, AND GENDER

All

	1976	1977	1978	1979	1980	1981	1982	1983	1984	1985	1986	1987	1988	1989
14-15	0.1	0.1		0.1	0.1	0.1	0.1	0.1	0.1	0.2	0.2			0.1
16-17	3.3	3.2	3.3	3.7	3.0	2.8	3.2	3.5	3.4	3.4	2.8	3.2	2.5	2.7
18-19	36.0	35.7	35.6	34.6	35.9	37.5	36.5	37.6	38.6	40.4	41.5	42.5	41.8	41.7
20-21	30.7	30.4	28.4	29.1	29.9	30.4	32.9	31.0	32.6	34.1	31.8	37.3	38.5	37.6
22-24	16.8	16.1	15.8	15.4	15.8	15.9	16.3	16.1	16.8	16.5	17.5	17.1	18.0	19.6
25-29	9.8	10.5	9.2	9.3	8.9	8.7	9.2	9.3	8.8	9.0	8.5	8.6	8.2	9.0
30-34	5.7	6.5	6.1	6.1	6.2	6.6	6.1	6.2	6.0	5.9	5.7	5.5	5.7	5.5
35-44												3.8	4.5	3.9
45-54												1.5	2.0	2.1
55+												0.3	0.3	0.3

White Men

	1976	1977	1978	1979	1980	1981	1982	1983	1984	1985	1986	1987	1988	1989
14-15	0.1			0.3	0.1	0.1	0.1	0.1	0.1	0.3	0.1	0.1		0.1
16-17	2.4	2.5	2.5	2.9	2.3	2.4	2.9	2.8	2.4	3.6	2.4	3.1	1.6	2.2
18-19	36.7	37.5	36.4	34.6	36.2	37.5	36.0	37.2	40.2	40.0	43.0	43.4	40.1	41.8
20-21	32.9	33.7	31.3	31.3	32.9	31.9	35.7	35.0	35.3	36.3	32.9	40.6	40.0	38.7
22-24	20.2	18.9	18.8	17.5	17.7	18.7	17.7	18.7	19.9	18.7	18.4	18.2	20.6	20.1
25-29	12.7	12.3	10.8	10.3	9.3	8.9	9.8	10.1	9.1	9.3	9.3	8.3	7.7	9.0
30-34	6.3	6.6	6.1	5.7	5.5	5.8	5.3	5.3	5.4	5.4	5.2	4.9	5.2	4.8
35-44												2.9	3.2	2.9
45-54												0.8	1.1	1.3
55+												0.2	0.2	0.2

White Women

	1976	1977	1978	1979	1980	1981	1982	1983	1984	1985	1986	1987	1988	1989
14-15	0.0	0.1		0.1	0.1		0.1	0.1	0.1	0.1	0.2			
16-17	4.2	3.8	4.0	4.3	3.9	3.4	3.8	4.1	4.6	3.7	3.5	3.3	3.1	3.2
18-19	37.5	36.8	37.3	37.0	38.4	40.1	40.4	43.3	42.6	45.7	43.7	44.4	48.1	46.2
20-21	30.1	27.8	26.4	28.9	28.8	31.4	32.8	29.3	31.6	34.0	32.3	36.4	39.2	39.0
22-24	13.6	13.0	12.6	13.5	14.4	12.9	14.1	13.2	13.8	14.6	15.9	15.9	16.2	19.2
25-29	6.8	8.4	7.6	8.7	8.4	7.6	8.7	8.3	8.6	8.7	7.8	8.2	8.2	9.3
30-34	4.6	5.8	5.7	6.4	6.8	7.3	6.5	6.7	6.5	6.6	6.1	6.2	6.1	6.0
35-44												4.8	5.8	5.2
45-54												2.2	3.0	3.0
55+												0.4	0.3	0.4

	1976	1977	1978	1979	1980	1981	1982	1983	1984	1985	1986	1987	1988	1989
Black Men														
14-15										0.8				
16-17	1.9	3.1	2.3	2.1	2.4	1.2	1.7	2.2	2.9	1.0	1.8	2.3	1.1	1.4
18-19	24.2	18.1	23.1	22.1	19.6	24.8	22.7	17.3	21.3	23.3	23.4	30.8	21.1	24.4
20-21	24.8	25.6	23.1	24.0	21.7	18.6	18.1	21.5	25.0	28.0	22.8	26.7	20.0	22.1
22-24	17.7	17.8	14.0	13.5	12.4	14.4	15.7	16.8	16.4	11.9	15.8	14.1	14.3	14.1
25-29	11.0	11.9	9.4	8.0	9.9	10.8	8.4	8.2	8.5	5.5	6.6	8.3	6.2	5.5
30-34	8.8	9.2	7.3	6.1	6.6	6.5	5.6	6.7	6.2	3.9	5.5	3.2	4.1	3.1
35-44												2.6	2.9	2.5
45-54												1.6	1.1	0.2
55+												0.1	0.3	
Black Women														
14-15	0.2					0.3	0.2		0.3	0.2	0.3			
16-17	3.8	3.2	4.3	5.3	2.8	3.9	2.0	3.5	4.2	1.9	1.4	3.5	4.8	4.5
18-19	32.6	31.1	27.2	29.4	31.9	29.2	25.1	27.6	27.0	24.9	34.7	34.4	31.7	31.4
20-21	25.0	26.5	23.7	20.3	21.8	23.2	25.2	22.4	24.2	23.1	23.0	25.9	34.3	34.6
22-24	13.9	11.9	13.3	13.7	12.6	13.1	15.3	13.1	13.6	13.5	16.7	14.0	11.9	18.5
25-29	7.9	10.2	7.8	6.9	7.1	8.0	7.8	6.4	5.9	8.3	7.0	8.3	7.7	6.2
30-34	6.3	8.5	7.5	6.9	5.9	6.8	8.1	7.4	5.5	5.6	5.8	6.1	6.7	5.7
35-44												3.6	4.8	3.0
45-54												1.1	2.3	2.3
55+												0.2	0.2	
Hispanic Men														
14-15							0.2				0.6			
16-17	1.3	2.3	2.5	3.3	0.6	1.7	1.5	3.7	0.8	2.9	1.4	0.8	2.8	1.6
18-19	26.7	22.5	24.1	26.1	22.1	19.8	17.3	15.3	16.9	16.2	26.6	22.9	20.5	20.1
20-21	19.4	20.1	13.8	18.8	18.8	21.2	18.4	19.5	24.1	19.4	16.4	26.5	19.0	15.2
22-24	17.3	13.6	12.5	12.4	8.8	10.2	10.8	12.7	11.0	12.3	11.7	11.4	12.5	11.0
25-29	10.4	12.4	9.5	7.9	6.2	7.5	7.1	10.2	6.6	7.9	7.7	7.4	4.5	6.4
30-34	5.6	5.8	3.5	5.6	5.6	5.8	3.6	2.8	4.6	4.0	3.1	4.6	3.2	3.1
35-44												1.7	2.5	2.7
45-54													0.6	0.4
55+													0.6	0.3
Hispanic Women														
14-15														
16-17	3.6	3.3	3.4	4.0	2.8	3.2	3.6	2.5	1.1	1.8	1.6	1.7	1.3	3.8
18-19	26.9	25.2	21.7	22.9	23.8	22.5	30.7	30.4	30.2	27.8	27.3	20.6	34.7	28.3
20-21	19.3	20.6	14.3	18.8	14.4	16.8	21.5	21.0	26.3	25.2	20.6	18.8	10.0	18.3
22-24	12.1	5.7	9.2	7.6	12.1	12.1	9.7	9.3	9.0	9.7	12.5	12.9	10.9	11.2
25-29	4.2	4.9	5.5	6.0	5.1	7.1	6.4	5.4	6.7	4.3	8.2	5.9	6.7	5.0
30-34	2.4	4.7	3.4	5.7	3.8	2.8	4.4	3.6	4.9	6.7	5.3	3.3	4.9	2.8
35-44												3.1	3.0	4.6
45-54												1.2	0.5	0.6
55+												0.1	0.6	0.4

Source: U.S. Department of Commerce, Bureau of the Census,

Current Population Reports, Series P-20.

1976	Number 319	(February 1978)
1977	Number 333	(February 1979)
1978	Number 346	(October 1979)
1979	Number 360	(April 1981)
1980	Number 362	(May 1981)
1981	Number 400	(July 1985)
1982	Number 392	(September 1984)
1983	Number 394	(October 1984)
1984	Number 426	
1985	Number 426	
1986	Number 429	(August 1988)
1987	Number 443	(April 1990)
1988	Number 443	(April 1990)

1989 Due possibly in March 1991

STUDENT AID

IS IT WORKING LIKE IT IS SUPPOSED TO?

By Carol Frances

It's time to step back, take a hard look, and ask fundamental questions about student aid. Congress is about to begin its reauthorization of the student-aid legislation, and educators are focusing attention on the details of assessing students' *need* for assistance and on amendments to the original program. In addition, we should be asking: Is student aid, as a system, working like it is supposed to?

The usual response is, "Yes, it is," or, "Yes, well, more or less." Those opinions are formed in part from information provided by the U.S. Department of Education and by education associations. Looking at the conclusions of major reports released recently and at statements in speeches and testimony before Congressional committees, the premises on which these conclusions stand might be stated as follows:

1. College enrollment is up, and college-going rates are up, so we continue to make progress in broadening access to higher education.
2. Minority enrollment is up.
3. The real value of student aid is currently back up higher than the level reached in 1980–81.
4. Student loans are not an undue burden on students.
5. Costs of college are a major concern, but the increases in tuition are offset by increases in student aid for needy students.
6. Education is adequately funded; resources are not the issue. It is

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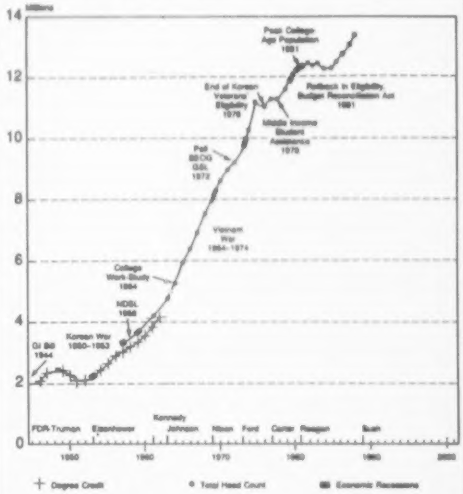
Chart 1
Chronology of Student-Aid Programs, Economic Cycles, and Political Events That Have Affected College Enrollments



Source: Based on data from NCES.

time to examine how well education institutions perform with the resources they have. In any event, given the budget deficits, no more funds are available.

These six premises are, I believe, intended to support a conclusion that the system is generally working all right. The six are based, I argue, on a combination of information and misinformation. This article is an attempt, first, to get a better handle on the facts, and, second, to assess what the facts tell us about how well the system of student aid is actually working.

First, let's look at the six premises behind student-aid policy and compare them with the facts.

Premise 1—*College enrollment is up and college-going rates are up.*

College enrollment is, indeed, up. After upward revisions of early estimates of opening-fall enrollment in academic year 1989, total college enrollment appears to have reached a level of 13.5 million students. This is an increase of more than 10 percent over the 12.1 million students enrolled in 1980. This increase is especially significant, given the widely publicized projections of enrollment decline of up to 15 percent in the 1980s.

Overall college-going rates are also up, as the charts show; almost six in ten high school graduates now enter college, up from just over five of ten a decade ago. These are encouraging signs. The question is, however, what role has student aid played in sustaining enrollments and supporting the recent increases?

Chart 1 shows a chronology dating the enactment of student-aid programs, plus economic cycles and political events that might have affected college enrollments. Enrollments increased after the enactment of every major student-aid program. In the 1980s, enrollments surged ahead, even after middle-income students lost their loan eligibility in the Budget Reconciliation Act of 1981.

Does this mean there is enough student aid because students are, after all, finding ways to pay for colleges and enrolling?

The picture is not quite so rosy as the aggregate data suggest. First of all, the college-going rate of young people from upper-income families is still three to four times that of people from lower-income families—this almost two decades after the nation committed itself to broadening access to college with the enactment of the Basic (now Pell) Grant program in 1972. The persistent disparities in college-going rates by income level are shown for 1986 on Chart 2.

Second, while overall college-going rates are up, the rates for blacks and Hispanics are lower than those for whites, and the gap is widening significantly, as shown in Chart 3. A large part of the gap in overall college-going rates is explained by the fact that a larger share of the minority groups have lower incomes—and, as we have already seen, lower-income people have lower college-going rates. But this is hardly consolation, since the disparity between white and minority household incomes has increased in the 1980s, as shown in Chart 4.

Third, the growth of enrollment in the 1980s was accounted for almost entirely by people age 25 and over. In fact, women 35 and over make up a huge majority of the additional college students.

Although the growth in enrollments is accounted for primarily by older students, student aid is significantly less a factor in the enrollment of older than of younger students. While close to 40 percent of the undergraduate students who are traditional college age receive federal financial assistance, fewer than a quarter of the undergraduates, and only 15 percent of the graduate students age 35 and over, receive student aid under current federal programs.

The growth of enrollment from 1980 to 1986 for men and women in the traditional college-age groups and for those who are older is shown on Charts 5 and 6. (Data for 1987 and later are not yet available in comparable age groups because the groups are not yet adjusted for a large number of respondents who did not report their age; but the basic trends appear to continue.)

Premise 2—*Minority enrollment is up*

Minority enrollment is, indeed, also up. According to unpublished data just compiled by the U.S. Department of Education, minority enrollment increased from 1.9 million in 1980 to 2.4 million in 1988. The trends in minority enrollment are shown on Chart 7. Minority enrollment increased more than 20 percent over these eight years, compared with under 5 percent for white non-Hispanics, as shown on Chart 8. Half the increase in college enrollment in the United States from 1980 to 1988 is accounted for by increases in the number of minority students.

From the mid-1970s to the mid-1980s, however, the term "minority" got redefined. In the 1950s and 1960s, "minority" was used almost interchangeably with "black." But as other minorities became active in pressing their claims for greater opportunities, Hispanics, American Indians, and, more recently, Asian Americans, were identified in the statistics and added to the minority category.

From 1980 to 1988, close to 95 percent of the increase in minority enrollment in college was accounted for by minority students other than blacks.

Trends in enrollment by race have exhibited sharply different patterns since 1976, when the biennial surveys of enrollment by race were first carried out for the Department of Education by the Bureau of the Census using the Current Population Survey. There appear to be three different periods with three different patterns of enrollment growth. The three distinct four-year periods are 1976 to 1980, 1980 to 1984, and 1984 to 1988. The patterns of enrollment growth for the three periods are contrasted on Chart 9.

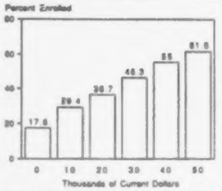
The late 1970s was a period of rising tuition costs but with even greater increases in student financial aid, with continuing increases in college-age population, which combined to produce large increases in enrollment.

The early 1980s was a period of even sharper rates of increase in tuition, which rose at unprecedented rate, together with declines or slow growth of student aid, and the beginning of the decline in the college-age population. These three forces combined to produce a small decline in white enrollment and a large decline in black enrollment. The declines in both white and black enrollment were offset by increases in Hispanic and Asian enrollment, which were driven in part by increases in these population groups from immigration. *All* of the increase in college enrollment during this period was accounted for by Hispanics and Asians.

While the period from 1980 to 1984 was discouraging, there appear to be more encouraging signs since 1984. From 1984 to 1988, enrollment in college of all the major racial and ethnic groups has increased.

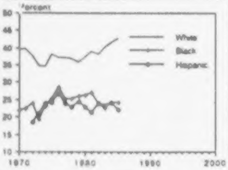
The decline in the enrollment of black students appears to be turning around. While black enrollment declined by a staggering 31,000 from 1980 to 1984, it increased by 54,000 from 1984 to 1988.

Chart 2
College-Going Rates by Income Level, 1986



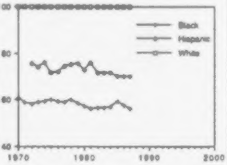
Source: USDC, Bureau of the Census

Chart 3
College-Going Rates of 18- to 19-year-olds, by Race



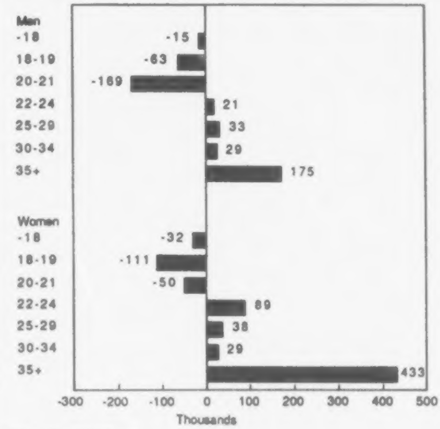
Source: Calculated from Census data

Chart 4
Median Household Income, by Race, Percent of White Income



Source: Current Population Reports

Chart 5
Change in College Enrollment by Age and Gender, 1980–1986



Source: U.S. Department of Education.

An assessment of how student aid is working depends at the outset on a reasonably accurate measurement of exactly how much aid is being awarded.

During this most recent period, the rate of increase in tuition slowed dramatically, and student aid increased again. These forces helped produce a turnaround in enrollment of all the groups.

Premise 3—*After adjusting for inflation, total student aid had climbed back up to a level about 10 percent higher in 1988–89 than it was in 1980–81.*

An assessment of how student aid is working depends at the outset on a reasonably accurate measurement of exactly how much aid is being awarded. The College Board, in recent publications, concludes that by 1988-89, in real terms, total student financial aid had increased about 10 percent above the 1980–81 level. This is an important conclusion lending support to the general proposition that the student-aid system is working.

To reach the conclusion that the real level of student aid is back up above the 1980–81 level depends critically on two propositions: first, that loans are functionally equivalent to grants in providing financial assistance to students; and second, that the consumer price index is an appropriate series to use in adjusting student aid for inflation.

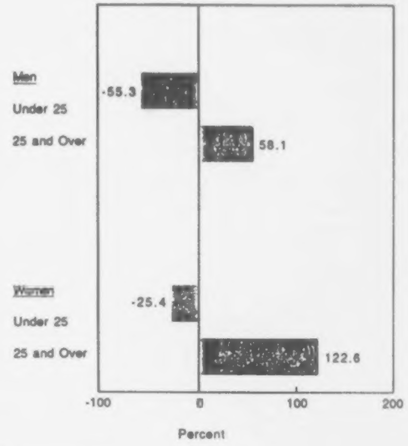
The costs of loan and grant programs may be counted the same on a ledger as dollars spent. But *loans* are not the same as grants because they do not have the same effect on students. For students, grants reduce the cost of education; loans, by the time they are paid back with interest, increase the cost of education.

Further, many of the dollars labeled as federal "student aid" are not paid to students or to colleges. The checks go directly from the federal treasury to a lender or loan-guarantee agency as incentives to encourage their participation in the program. These payments to the lenders do not make it less expensive for students to secure an education; they compensate lenders for the increasing costs of obtaining loanable funds in an era of high real rates of interest. They are affected as much by federal monetary and fiscal policies as they are by any education policy commitments to broadening access to higher education.

Virtually all the increase in federal student aid from 1980 to 1988 has been in the form of loans, as shown on Chart 10. Increases in the total amount of Pell grants awarded in the early 1980s under Department of Education programs were offset by decreases in the amount of grant aid awarded under the Veterans programs, and by the elimination of the grant assistance provided through the Social Security Administration, as shown on Chart 11.

Grant aid to students has increased since 1980–81, but the overwhelming preponderance of the additional aid has been provided by the institutions themselves. The trends in the total amount of grants awarded by the federal and state governments and by the institutions is shown on Chart 12. Institutionally funded student aid rose from about $2 billion in 1980–81 to well over $5 billion in 1988–89—an in-

Chart 8
Percent Distribution of the Increase in College Enrollment, by Age and Gender, 1980–1988



Source: U.S. Department of Education

crease of $3 billion, as shown on Chart 13. Almost all of the $3 billion addition was provided to students in the form of grants.

Further light is shed on the premise that the real value of student aid is back up about 10 percent above the 1980-81 level by noting that the consumer price index, which is commonly used to adjust student aid for the effects of inflation, is constructed using a market basket of goods and services that does not reflect the purchases made by students. Creating a preliminary mock-up of a "student cost index" to trace the rise in student costs of tuition, room and board—costs that students actually face—indicates that the effects of inflation on student costs are much greater than would be found using the CPI. Using the CPI overstates the real amount of student aid awarded to students in the 1980s by a staggering $10 billion.

Taking just the grant portion of student aid, and adjusting it using the mock-up of the student cost index yields a conclusion that the real value of student grants in 1988-89 was *not* about 10 percent higher than it was in 1980-81: it was not much more than *one-half* that level. The dramatic differences resulting from using a student cost index rather than the CPI to adjust for inflation when assessing the adequacy of student aid is shown on Chart 14.

If the value of student aid has climbed back up to, or exceeded, levels reached in 1980-81, and enrollment of some groups is not increasing, the search for explanations focuses on the behaviors of students and of institutions. If, however, the value of student aid is much *less* than previously thought, the search for explanations widens to include an examination of the student-aid system itself, and whether that system works adequately to broaden access to education.

Premise 4—*Student loans are not an undue burden on students.*

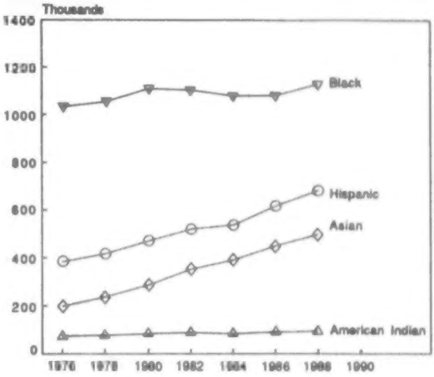
The usual argument is that students who go to college benefit from earning much higher salaries after they graduate than those who do not, and they can easily repay the loans out of their added income. In many cases, this is true—though it may not be so for teachers, nurses, social workers, or other graduates who borrowed to finance an education for entry into comparatively low-paying jobs. And it is decidedly *not* so for students forced to take a loan for a chance at college and who, failing to complete their program, face years of monthly payments without the expected increase in earning power—and thus default on their loans.

There are other important, but often overlooked, dimensions to the discussion of the burden of student loans. One is that comparative asset positions, as well as annual incomes, are important in evaluating how well a system of student aid based significantly on borrowing is working.

The ownership of assets significantly affects people's ability to invest in a home or start a business. The lack of assets for those below the poverty line may have even more impact in shaping their willingness and ability to plan and invest in the future than does current income.

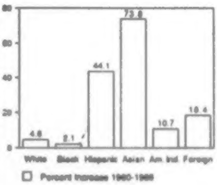
Different methods of financing college education have vastly different impacts on students' ability to accumulate assets. Take two students who go to the same college, major in the same subject, graduate at the same time, go to work for the same company, have the same career and income progression over the next 15 years, the same savings rate and return on the funds they invest—and postulate only one difference between them: one student has to borrow $10,000 to pay for college, and the other does not. At the end of the 15-year term of the loan, the student who did not have to borrow could

Chart 7
Trends in Minority Enrollment, 1976–1988



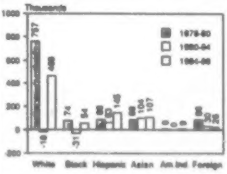
Source: U.S. Department of Education.

Chart 8
Enrollment Change, by Race, 1980–1988



Source: Based on USDS data.

Chart 9
Enrollment Change, by Race, over Three Periods: 1976–1980, 1980–1984, 1984–1988



Source: Based on USDS data.

hold four to six times as much in assets as the student who had to borrow. This great disparity in assets is illustrated on Chart 15.

Take the example one step further: consider that the student who borrowed, in effect, borrowed funds deposited in the bank by the parents of the student who didn't borrow. In a high-interest era, the interest paid by the borrower makes it easier for the parents of the non-borrower to finance the loan-free education of younger children and grandchildren. To the extent that low- and middle-income people are required to take on large debts because of shortfalls in the funding of student grants, we wind up with the poor paying for the education and the post-graduate prosperity of the well-to-do. The potential disparity in future assets could become the engine for widening divisions within American society.

Student loans were originally envisioned as a supplemental source of support to widen students' choice of attending institutions charging higher tuitions. With the failure of grant aid to keep up with college costs, more and more of those costs are covered by student borrowing. Increased student borrowing, in an era of very high real interest rates, widens the potential disparity in assets and economic prospects. The unintended consequence is that excessive loan financing for higher education results in exacerbating the income inequality that the education was supposed to mitigate in the first place.

Premise 5—*Rising college costs are a serious concern to students and their parents, but, as tuitions are increased, more student aid is made available to offset the increases for the neediest students.*

This is the way the system is supposed to work but often it does not. In the 1970s, student aid increased faster than student need, as measured by tuition, room, and board costs. In the 1980s, the opposite was true: student need increased much faster than the aid available to pay for the costs.

If student aid were keeping up with need, gross tuition, student aid, and net tuition (gross tuition minus student aid) would all three track each other with about the same rate of change. But, in reality, net tuition, after subtracting available student aid, has gone up *faster* than gross tuition—which is another way of saying that student aid has not kept up with the need. As shown on Chart 16, tuition increases were smallest when student aid increases were the largest; shortfalls in student grants are now doing more to drive up tuitions than the other way around.

Because of a shortfall in student grants, the colleges and universities themselves provide institutionally funded student aid. In 1985–86, the private institutions provided $1.6 billion in scholarships and fellowships from their unrestricted education and general funds, while the public institutions provided $700 million. Some of the funds to pay for the institutionally funded student aid came from increases in tuition, setting up a vicious circle of further shortfalls in aid and still more rounds of tuition increases.

The end result is, in effect, a tax transfer system, built on top of the education financing system, that transfers resources mostly from middle-income families to lower-income families. To the extent that institutionally funded student aid is financed by increased tuition paid by students who do not receive aid, we are looking at new "taxes" that are likely to exceed $5 billion a year in the 1990s, and are likely to fall largely on middle-income families who happen to have children in college. This income redistribution ought to be the responsibility of the society as a whole, not added to the burdens of families straining to pay for college without financial assistance.

Premise 6—*Higher education is adequately funded. . . . and, in any event, given the budget deficits, there simply are not any more funds available for higher education.*

The fundamental question is, where do we, as a nation, put education—elementary education, secondary education, and higher education—among our national priorities?

Comparative trends in spending at the federal level for defense and for education and training are shown on Chart 17. Both are shown in current dollars.

From 1980 to 1988, total federal outlays increased $474 billion. Of this $474 billion increase, defense received $156 billion in additional outlays. Interest payments on the federal debt required an additional $100 billion. Of this $474 billion increase, less than $1 billion was allocated to education and training. Increases in funding for education were offset by decreases in funding for training. The added outlays by major function from 1980 to 1988 are shown on Chart 18.

Trends in the share of the state budgets invested in education are shown on Chart 19. The response to the perceived military threat represented by Sputnik was a significant increase in the share of state spending invested in education. In contrast, the response to the competitive challenge in the economic arena represented by Toyota has been an erosion of the share of state budgets allocated to education. These two charts show clearly the budget choices that have been made at both the federal and state levels.

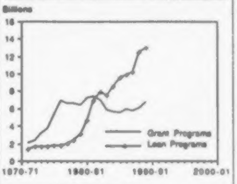
Student Aid: '70s, '80s, and '90s

A quick review of the three decades would look like this. In the 1970s, colleges and universities tried to keep their costs low and student aid increased sharply, but rising inflation ate away at the resources of institutions and at the incomes of people paying for college.

In the 1980s, needs to restore the human, physical, and financial capital of the institutions generated increases in costs that were higher than the overall rate of inflation. Non-tuition revenues did not increase as fast as the increase in base costs; tuitions were increased very rapidly at the beginning of the decade to make up for the shortfalls. This resulted in problems for higher education in the political arena. Then general inflation dropped sharply, the rate of increase in tuitions slowed—but not as fast as the consumer price index—and student grants did not keep up with the student costs. The result was a huge increase in student and parent borrowing to pay for college.

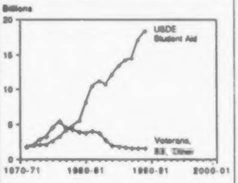
In the 1990s, for student aid to work, we have to provide *both* sufficient public and private funding to help keep tuition down at *both* public and private institutions, *and* sufficient stu-

Chart 10
Federal Student Aid: Changing Composition from Grants to Loans



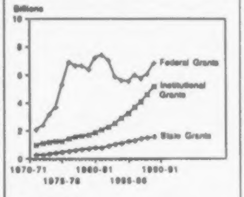
Source: Based on College Board data

Chart 11
Federal Student Aid:
Inside/Outside Department of Education



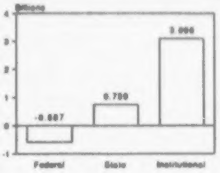
Source: College Board

Chart 12
Trends in Student Grants, 1970–71 to 1988–89



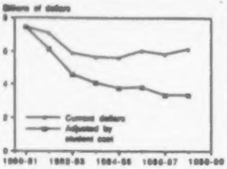
Source: College Board

Chart 13
Changes in Total Grants Awarded to Students, by Sector, 1980–81 to 1988–1989



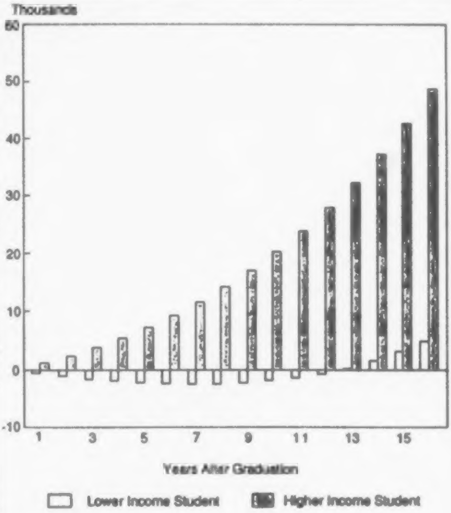
Source: College Board

Chart 14
Federal Student Aid: Student Grant Programs (Current Dollars/Adjusted by Student Cost)



Source: Calculated by Carol Frances and Associates using USDE, USDC, and College Board data.

Chart 15
Example: Net Financial Position of College Graduate After Borrowing vs. Saving/Investing



Source: Calculated by Carol Frances and Associates.

dent aid. The policy of increasing tuition and offsetting the increases with student aid for needy students was originally advocated as a "reform" in the late 1970s. It was seen as a more equitable, cost-effective way of financing higher education than low tuition, which, it was argued, benefited unnecessarily students who could afford to pay more for college.

But the high-tuition/high-student-aid (actually *loan*) system is generating its own set of anomalies and inequities. Grant aid did not keep pace with student costs in the 1980s, and the result was a huge increase in student and parent borrowing. Excessive dependence on loans to finance higher education in a period of high real interest rates became an engine for greater economic and social inequality.

To reduce dependence on loans, a number of innovative reforms are now being proposed, ranging from various forms of prepaid tuition, or tuition futures, to educational savings plans. Even the most sensible of the innovations have inherent flaws. In the prepared tuition plans, the colleges and the parents are betting against each other as to who can best predict the rate of inflation. The relatively well-off parents are the ones who can prepay tuition. If the colleges underestimate the rate of increase in their future costs, it will be lower-income students and taxpayers who will be financing the benefits to higher-income families. There is also great risk of generating yet more unfunded liabilities that future state governments will have to face.

Or, if plans are developed to encourage savings to meet future college costs, the frugal families may save up enough to make themselves ineligible for the student aid that the wasteful can claim—which is certainly a great disincentive to savings.

Treatment of the ownership of assets in determining eligibility for student aid is also a box there is no clearly equitable way to get out of. Counting assets in the calculation of need hurts some students, but not counting them hurts others, in ways that cross purposes with the intent of helping the students that need financial assistance.

And we also have created an army of

people to administer the student aid programs, do student aid audits, and track down defaulters.

The problems with the student-aid system have less to do with the features of the individual programs, and more to do with the inadequate funding of the grant programs. Even the structural shift of student aid away from lower income students toward middle income students is connected to the problem of inadequate funding of grants to low income students.

Poor Choices

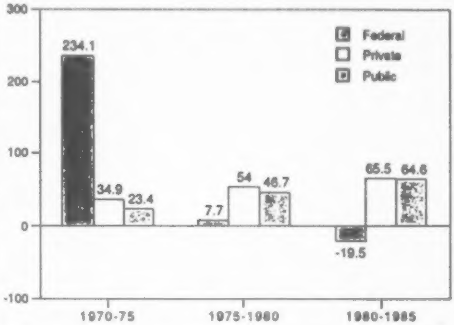
Educators concerned about adequate funding for student aid, together with those concerned about funding for the other domestic social programs, in recent years have confronted the taunt that all they want to do is "tax and spend, tax and spend." They have countered with challenges to the tax cutters that all *they* want to do is "borrow and spend, borrow and spend." What we have actually been doing may come closer to "steal and spend, steal and spend," unless we begin to pay back some of what we have borrowed from our children and their future children.

To put the needs for investment in education into perspective, consider that in national consumption the 1980s were a trillion-dollar decade, three times over. In the 1980s we consumed a trillion dollars more than we produced. We added close to a trillion dollars to our national debt. And financiers spent close to a trillion dollars on mergers and acquisitions, not all of which resulted in increased productivity.

We are not a poor country. Beyond discussion of amendments to the Higher Education Act, we should be talking about America's investment priorities. We are a rich country making poor choices. Through inadequate funding of educational institutions, and inadequate funding of student aid, we have permitted a serious neglect of investment in our human resources. We now face a serious risk of making our country weaker and our children poorer as a result.

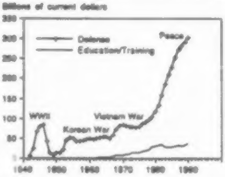
To make the nation's education-finance/student-aid vehicle work, we do not have to rebuild the engine. We have to buy the gas. ☐

Chart 16
Comparison of Increases in Student Aid and Tuition Charges



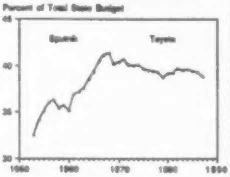
Source: Based on data from the USDE and the College Board.

Chart 17
Federal Budget Outlays for National Priorities



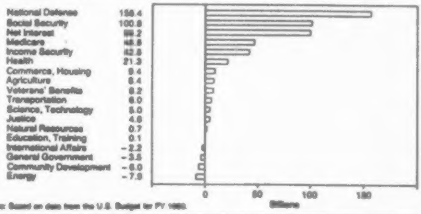
Source: Carol Frances & Associates. Based on data from OMB historical tables.

Chart 19
Trends in the Share of State Budgets Allocated to Education

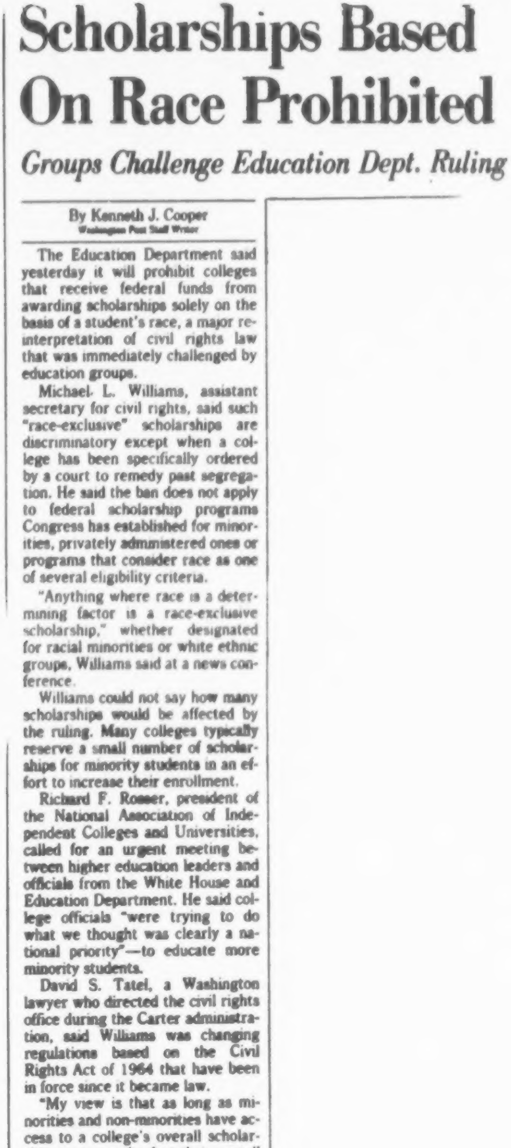


Source: Calculated from USDC data.

Chart 18
Increase in Federal Budget Outlays, by Function, 1980–1988



Source: Based on data from the U.S. Budget for FY 1990.



Scholarships Based On Race Prohibited

Groups Challenge Education Dept. Ruling

By Kenneth J. Cooper
Washington Post Staff Writer

The Education Department said yesterday it will prohibit colleges that receive federal funds from awarding scholarships solely on the basis of a student's race, a major reinterpretation of civil rights law that was immediately challenged by education groups.

Michael L. Williams, assistant secretary for civil rights, said such "race-exclusive" scholarships are discriminatory except when a college has been specifically ordered by a court to remedy past segregation. He said the ban does not apply to federal scholarship programs Congress has established for minorities, privately administered ones or programs that consider race as one of several eligibility criteria.

"Anything where race is a determining factor is a race-exclusive scholarship," whether designated for racial minorities or white ethnic groups, Williams said at a news conference.

Williams could not say how many scholarships would be affected by the ruling. Many colleges typically reserve a small number of scholarships for minority students in an effort to increase their enrollment.

Richard F. Rosser, president of the National Association of Independent Colleges and Universities, called for an urgent meeting between higher education leaders and officials from the White House and Education Department. He said college officials "were trying to do what we thought was clearly a national priority"—to educate more minority students.

David S. Tatel, a Washington lawyer who directed the civil rights office during the Carter administration, said Williams was changing regulations based on the Civil Rights Act of 1964 that have been in force since it became law.

"My view is that as long as minorities and non-minorities have access to a college's overall scholarship program, the fact that a small portion is designated for minorities is not a problem," Tatel said. "They do not deny overall scholarship opportunity to whites."

"This is a crude and blatant attempt to seriously cripple, if not kill outright, the well-intentioned ef-

A10 Thursday, December 13, 1990

Race-Based Scholarships Prohibited

SCHOLARSHIPS, From A1

forts . . . to provide educational opportunities for minority students," said Benjamin Hooks, executive director of the NAACP.

"We will fight this directive with every possible means at our disposal and we have instructed our attorneys to immediately begin studying the possibility of bringing a legal challenge," he said.

Under the most extreme penalty the department can impose, a college found to discriminate could lose federal funding in the form of student aid and research grants.

Richard Komer, deputy assistant education secretary for civil rights, said the department has received five complaints concerning discriminatory scholarship programs within the last year, and all are pending.

Two came from the Washington Legal Foundation, a conservative advocacy group. John Scully, its counsel, said he filed complaints in May about scholarship programs for minority students at the University of Florida and Florida Atlantic University.

Williams said he expects colleges to comply voluntarily with the regulations and will not conduct a systematic search for discriminatory programs. His office is obliged, however, to investigate whatever complaints it receives.

The scholarship issue surfaced last week when the department revealed that Williams had warned organizers of the Fiesta Bowl football game in Tempe, Ariz., about their plans to contribute $200,000 in scholarships for minority students at the two schools that will play in the bowl New Year's Day.

Williams said the two schools, the University of Louisville and University of Alabama, could not award the scholarships themselves because they receive federal funds, but the Fiesta Bowl could do it because it is a not federally funded. Williams said his office is continuing to advise bowl officials on the matter.

Williams said department officials had decided on the reinterpretation on their own and had not cleared it with the White House. President Bush has been sharply criticized by civil rights groups for his veto in October of new civil rights legislation that he said would result in racial quotas.

Education Secretary Lauro F. Cavazos, who resigned yesterday, was an advocate of making college more accessible to minority students. But Williams and Komer said the department has never issued a broad policy statement on scholarships designated for minority students—something they plan to do soon—and has made inconsistent rulings in the past. "The fact of the matter is we have been on both sides of this issue," Komer said.

Komer said two of three "letters of finding" issued by the department since 1983 have approved scholarships for minority students, including one last year approving a University of Colorado program for minorities. Also upheld in 1983 was a program that excluded a Cuban American because "he wasn't the right sort of Hispanic," Komer said.

Congress could direct the department to permit the scholarships. Rep. William D. Ford (D-Mich.), the incoming chairman of the Education and Labor Committee, said the panel "will be taking a closer look at just what the administration has in mind."

Rosser said that word of the department's decision is "already creating all kinds of chaos. We have students applying for scholarships right now, and we may have a number of financial aid programs in question. What kind of impact is this going to have on minority students, in particular?"

"I hope the upshot is colleges and universities keep on doing what they are doing," said Robert Atwell, president of the American Council on Education, an umbrella organization of higher education groups. "We don't see any reason for them to change and we hope the Office for Civil Rights will change its position on sober reflection."

Race and College Aid

Recent Supreme Court Rulings Open Way For U.S. Move Against Favoring Minorities

By NEIL A. LEWIS
Special to The New York Times

WASHINGTON, Dec. 12 — In defining the legal underpinnings for its decision that colleges receiving Federal funds may no longer offer scholarships solely on the basis of race, officials of the Department of Education drew on some recent Supreme Court cases to support their argument that most programs with racial preferences are illegal.

News Analysis

The cases reflect the High Court's growing willingness to restrict programs that afford special preference to minorities, at the same time that the Bush Administration has made known its interest in curtailing those programs.

After announcing the decision, Michael L. Williams, the Education Department's Assistant Secretary for civil rights, sought to play down any political implications and said the decision had been compelled by law and recent Supreme Court decisions.

"We're just law-enforcement folks," he said. He said scholarships aimed solely at minorities, or any ethnic group, violated Title VI of the Civil Rights Act of 1964, which forbids discrimination on the basis of race, color or national origin.

He cited as support for the department's ruling a 1989 ruling in which the Supreme Court, by a 6-to-3 vote, struck down a program setting aside 30 percent of all municipal construction contracts for minorities in Richmond, Va.

Ironically, the Bush Administration's authority to regulate conduct in private universities comes from a 1988 law passed over President Ronald Reagan's veto. It allows the Federal Government to prohibit discrimination in any school, even private universities, that receives Federal money.

Rich Political Implications

Congress enacted the law after the Supreme Court ruled in 1984 in Grove City v. Bell in favor of the Reagan Administration's position that the Federal Government could only enforce antidiscrimination laws in those university departments that directly received Federal money and not the entire university.

Despite Mr. Williams's contention that prohibiting race-specific scholarships was merely an application of neutral legal principles, it is a decision rich with political implications.

The decision by the Education Department comes as the debate about race in America is increasingly defined as whether the nation should still provide some special advantages for blacks to redress a history of discrimination or whether it is time to say, "enough is enough."

Mr. Williams said he could not estimate how many colleges or scholarships would be involved. But the effect of the Education Department's order may be more symbolic than anything else.

Using Race as a Factor

He noted that in the Supreme Court's 1978 ruling in the Bakke case, involving medical school admissions, the Justices said that colleges and universities may take race into account but could not use it as the sole factor. Mr. Williams said college administrators may similarly use race as one factor in awarding scholarships to increase diversity.

He also said that if the scholarships were directed on the basis of financial need, a large portion would still go to minorities.

Further, any university under court or government order to increase its minority enrollment would be exempt from the prohibition.

Dallas Martin, president of the National Association of Student Financial Aid Administrators, said there are no figures on the number of scholarships or the total amount of financial aid available at the nation's approximately 3,000 institutions of higher learning.

But Mr. Martin estimated that fewer than half of those schools may have scholarships devoted to minorities. Usually, these will be one to three small stipends of a few hundred dollars. These scholarships, he said, typically were established in the 1960's by small groups or individual donors. "It's a very small amount of money we're talking about," he said. The department's ruling would not affect private scholarships that are not administered by the schools.

The Education Department order also comes at a time when Mr. Bush's relationship with the major civil rights groups is especially strained because of his veto of the Civil Rights Bill of 1990 over the issue of affirmative action and quotas. Mr. Bush contended that although the measure explicitly prohibited quotas in hiring and promotion, if it became law it would nonetheless lead inevitably to such practices.

Mr. Williams, one of the Administration's handful of committed black conservatives, seemed to relish defending the Administration from questions at a news conference about whether the action signified a lack of commitment to civil rights. But he took care to distribute to reporters a résumé that included mention of his efforts as an official in the Justice Department to prosecute Ku Klux Klan members.

Mr. Williams insisted that he did not formally consult with anyone in the White House, although he acknowledged he had privately discussed his plans with friends there. "This was initially, wholly and totally formed within this department," he said. There is widespread opposition in the White House to affirmative action programs, with some officials having an ideological commitment while others see it as a winning political issue.

The underlying debate is peculiarly American and the cycle of special preference followed by growing public and official intolerance has occurred before. Justice Joseph P. Bradley, writing for the Supreme Court in striking down the 1875 Civil Rights Act, said:

"When a man has emerged from slavery and by the aid of beneficent legislation has shaken off the inseparable concomitants of the state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen and ceases to be a favorite of the law."

With that ruling, the Court ended Reconstruction and 13 years later in Plessy v. Ferguson, the Justices approved as constitutional "separate-but-equal" facilities for blacks.

TIONAL *THURSDAY, DECEMBER 13, 1990*

Official Who Wrote the Rule Sees Consistency in Aid Ban

By KAREN DE WITT

Special to The New York Times

WASHINGTON, Dec. 12 — As an undergraduate and a law student at the University of Southern California in the late 1970's, Michael L. Williams challenged the university to increase its number of minority students.

But as head of the civil rights office in the Education Department, Mr. Williams is telling colleges and universities that if they give out scholarships based on race, except in a few instances, they will be violating the law.

The 37-year-old Assistant Secretary for Civil Rights sees no inconsistency in the actions.

"You have to go back to the position that we took at Southern Cal," he said today. "We said the university needed to look at a lot of other variables besides the S.A.T. in selecting students. We urged them to look at economic disadvantage, whether students overcome large obstacles, et cetera. We did not urge them to say we will admit 15 black students a year."

A Fresh Wind in June

Mr. Williams, a domestic policy analyst in George Bush's Presidential campaign in 1988, is a former Justice Department official. He was considered a fresh wind in a moribund agency when he took over the Education Department office in June.

Civil rights and education groups were cautiously optimistic that he would be sympathetic to their concerns, particularly because he emphasized the law-enforcement aspects of his office. He sought redress for anti-Asian admissions practices uncovered in a 30-month investigation at the University of California at Los Angeles. He also completed an investigation at Harvard University, concluding that there was no anti-Asian bias in admissions procedures there.

The Office of Civil Rights is responsible for enforcing Federal laws that prohibit discrimination based on race, sex, national origin, handicap or age in all education programs or activities that receive Federal money.

In his confirmation hearings Mr. Williams said that his office could support education goals that the governors and the President have set for the nation by insuring that grouping students by ability was not carried out in discriminatory fashion and that children whose first language is not English were not disproportionately placed in special education programs. These are concerns of education and civil rights groups.

But Mr. Williams draws his educational philosophy from the early roots of the civil rights struggle and its search not for racially balanced schools or busing, but for equal education opportunities for blacks.

Mr. Williams said today that the reaction to his policy prohibiting scholarships based on race was "maybe a bit of unnecessary frustration and anxiety." He added that he was not worried that without such scholarships, universities and colleges would not increase the number of minority students in their institutions.

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NEW YORK TIMES THURSDAY 12/14/90

Cavazos Quits as Education Chief Amid Pressure From White House

By MAUREEN DOWD

Special to The New York Times

WASHINGTON, Dec. 12 — Lauro F. Cavazos resigned under pressure as Secretary of Education today, even as his department and the Administration were plunged into a storm over a decision to bar Federal aid to colleges that offer scholarships designated solely for minority students.

Mr. Cavazos's resignation followed a White House meeting on Tuesday in which John H. Sununu, the chief of staff, told the Secretary that the President wanted him to leave the Cabinet by the end of the month. Mr. Cavazos, 63 years old and the nation's first Hispanic Cabinet member, said he would leave by the end of this week.

The departure was announced today at a Cabinet meeting that Mr. Cavazos did not attend. He issued a terse resignation letter in which he did not thank President Bush for the honor of serving in his Cabinet.

But White House officials insisted that there was no connection between the forced resignation and Tuesday's announcement of the scholarship policy. They said that, as they get closer to the 1992 elections, they needed to buttress Mr. Bush's assertion that he the "Education President" with a more forceful presence at the helm of the Education Department.

Some people close to Mr. Cavazos said that he was upset by the combative new posture of the Administration on affirmative action programs and the Tuesday announcement by another Education Department official of a new policy to cut off Federal aid to colleges that offer scholarships designated for minorities.

Mr. Cavazos has long been considered by Mr. Bush's advisers to be a weak link in the Bush Cabinet, and the President's domestic policy adviser,

Continued on Page B14, Column 4

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Cavazos Quits as Education Chief Amid Pressure From White House

Continued From Page A1

Roger Porter, has been the Administration's point man on education.

The announcement that "race-exclusive" scholarships were discriminatory and therefore illegal was made by Michael L. Williams, the head of the civil rights office in the Education Department. Mr. Williams said today he had not acted under instructions from the White House but had talked with lower level White House staff members who were and acquaintances.

Policy Change Surprises Bush

Senior White House officials seemed as surprised as everyone else to hear of the new scholarship policy and were careful to note that Mr. Bush had not put his stamp of approval on it.

"The President was not aware of the strategy prior to its undertaking," John Herrick, a White House spokesman, said tonight. "Now that we are aware of it, the White House is reviewing it."

White House officials said they were looking into the decision to see if was legal, if it was "easily reversible" and if it should be reversed.

Mr. Williams's announcement had a scalding effect in education and civil rights circles. Critics raised questions about its timing, following Mr. Bush's veto of a major civil rights bill and the bellicose comments of William J. Bennett, the former Education Department chief and Mr. Bush's new choice to head the Republican National Committee, that he is ready to challenge Democrats on the issue of racial quotas and affirmative action.

The American Council on Education, which represents over 1,800 higher education institutions, issued a statement advising its colleges and universities "to continue their current practices" on minority scholarships.

The New York Times

Lauro F. Cavazos, who resigned as Education Secretary.

"It would represent a giant step backward in efforts to improve educational opportunities for the nation's minority students," said Robert H. Atwell, the President of the American Council on Education. "We believe this advisory is incorrect and misguided and may be politically motivated."

Ralph Neas, the executive director of the Leadership Conference on Civil Rights, charged that "the Bush Administration seems determined to compile a worse civil rights record than the Reagan Administration."

Janell Byrd, the assistant counsel with the NAACP Legal Defense and Educational Fund, declared the scholarship decision was "race baiting — there is no other word for it," adding, "It seems the Bush Administration, at least Mr. Bennett, seems to believe that by stirring up what in effect is a race war, there is political capital to be gained."

Tapping White Resentment

Critics of the scholarship policy said that, as the nation enters a recession, there is more of a tendency to look for a political scapegoat and lash out at programs designed to redress grievances against minorities.

Christopher Edley Jr., a law professor at Harvard University who was an adviser to Michael S. Dukakis in the 1988 Presidential election, said: "The political dividends are obvious. It comes at a time when many whites feel as though they have been made to sacrifice to create opportunities for others. They think they've paid enough, and the Bush people are aware of that feeling out there."

Many Republicans are convinced that an anti-quota position has great appeal to large numbers of white voters, particularly economically pressed working class Americans who feel resentful about what they perceive as advantages for minorities.

By choosing Mr. Bennett for party chief, John Sununu and President Bush knew they were picking an outspoken opponent of favored treatment based on race.

A Dangerous Path

Republican party strategists insisted today that they did not expect a general backlash from people who might consider the Administration action heavy-handed. Any backlash that did develop, they said, would be largely concentrated among blacks and liberal whites, who do not support Mr. Bush in large percentages anyway.

Two political dangers face Mr. Bush, strategists from both parties say. The first is that he will undermine his efforts to reach out to minority voters. But more importantly, from an electoral point of view, there is a risk of antagonizing moderate, suburban Republicans for whom any hint of veiled racism is distasteful.

Robert Teeter, a top Bush strategist, said that the Administration's actions should not be seen as an ominous pattern by civil rights groups.

"Anybody who thinks George Bush is turning his back on civil rights is 100 percent wrong," he said. "There is a legitimate debate over whether race preference programs of any kind are a good idea. But to say anybody on the other side of that debate is a racist and against civil rights and minorities is just untrue. Maybe they just think quotas are the wrong way to help blacks."

Leaving Office by 5 P.M.

Mr. Cavazos's resignation came before an investigation into his wife's role at the department, conducted by the Education Department's inspector general's office, was made public.

Peggy Ann Cavazos, a former nurse, and the mother of their 10 children, came to the office daily with her husband and kept an office next to his for a period. She also sat in on meetings, edited speeches and policy papers and traveled with him.

Mr. Bush's advisers had worried that Mr. Cavazos, a holdover from the end of the Reagan Administration who liked to leave the office by 4:45 p.m., was turning into a political liability and undermining Mr. Bush's attempt to claim education as a strong suit.

Mr. Porter, the domestic policy adviser, had already sluiced away much of Mr. Cavazos' power, moving Charles Kolb, a deputy to Mr. Cavazos, onto his White House staff.

Mr. Cavazos is the third high-ranking Bush official to resign recently. Elizabeth H. Dole, the Labor Secretary and the only woman in the Bush Cabinet, resigned in October.

Mr. Bennett also resigned last month as Mr. Bush's drug policy director, but then accepted the post as the next chairman of the Republican National Committee.

In his letter of resignation, Mr. Cavazos said he was especially proud of his contributions "promoting the executive order on excellence in education for Hispanic Americans and raising awareness of the growing diversity of America's student population."

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Shock Grips Students Facing Loss of Money

By LISA BELKIN

Special to The New York Times

HOUSTON, Dec. 13 — [illegible]

> 'This shuts everything down for me. How will I pay for books?'

[illegible]

Offering Time and Freedom

[illegible]

"This shuts down everything for me," said Darrick Kelly, who depends on scholarships to minority students for tuition at the University of Houston.

> Some students applaud a ban on minority-only grants.

[illegible]

DO NOT FORGET THE NEEDIEST!

Move Against Minority Aid Is Debated

By MICHEL MARRIOTT

[illegible]

Great Deal of Confusion

[illegible]

> A wave of confusion and disbelief engulfs the nation's colleges.

Surprise and Strong Reactions

[illegible]

Many Colleges Use Need Only

[illegible]

Washingt.
12/14/90

Minority-Scholarship Curb Under Review

Administration Split as Criticism Rises

By Kenneth J. Cooper
and Ann Devroy
Washington Post Staff Writers

The White House said yesterday it would review the Education Department's decision to bar most colleges from awarding scholarships based on race as business groups joined education and civil rights groups in criticizing it.

But senior administration officials, who said they were not told in advance of the decision, were divided over whether to rescind the regulations, and a senior staff meeting yesterday morning was unusually contentious.

"There was serious hysteria here," one official said. "People saying, 'We gotta back off this now,' and others saying, 'Wait a minute, this is not at odds with our policy,' and everyone saying, 'What are the facts? We don't know the facts.' "

The internal debate mirrors a broader question facing the administration and the Republican Party. At issue is whether to extend the party's opposition to hiring quotas, reflected in President Bush's veto of the 1990 Civil Rights Act, into a broader attack on federal policies and programs that encourage or require special treatment for minorities.

In this case, the decision that "race-exclusive" scholarships are discriminatory and in violation of the Civil Rights Act of 1964 was made by Michael L. Williams, an assistant secretary of education, without consulting the White House. A department spokesman, Rita Fielek, said yesterday Williams's decision had been reviewed beforehand by department counsel Edward C. Stringer and Education Secretary Lauro F. Cavazos, who resigned Wednesday under pressure from the White House unrelated to the scholarship decision.

White House Chief of Staff John H. Sununu, sources said, has ordered a review of the decision, and C. Boyden Gray, the White House counsel, will assess the legal case history. Some senior officials made no secret of their desire to avoid the issue, but as one official put it: "Williams has forced this issue, set

See SCHOLARSHIPS, A28, Col. 3

THE WASHINGTON POST

White House to Review Minority-Scholarship Curb

SCHOLARSHIPS, From A1

it up, and now it is going to be much harder to avoid it if we want to."

Sources said the Education Department had not been directed either to continue or halt action based on the policy. "We haven't told them anything yet except we should have known about this before," said one official.

Joining critics of the new policy yesterday were the U.S. Chamber of Commerce and the Council on Competitiveness, which urged the department to reconsider the policy in light of population trends that indicate a national need to educate more minority professionals in the coming years.

"Our competitiveness depends on it," said Daniel Burton, executive vice president of the council, a coalition of business, education and labor leaders.

Robert Martin, who directs the chamber's Center for Workforce Preparation and Quality Education, said that because the country has in the past targeted education assistance to meet shortages of teachers and engineers, "it's not illogical to extend that to provide better representation of minority individuals."

At a news conference Wednesday, Williams said his decision to reinterpret regulations that date to the Civil Rights Act of 1964 was based on a Supreme Court decision last year that held that the city of Richmond could not reserve 30 percent of construction contracts for minorities.

"That case gave us some real guidance on what the law is as it relates to voluntary affirmative action. So we take our guidance from the court and the law," he said.

Williams did not explain how the case concerning contractual set-asides related to college scholarships, and a department spokesman said neither he nor any other official was available to amplify his legal rationale. The House Education and Labor Committee scheduled a hearing next week on his ruling.

The decision grew out of unsolicited advice Williams had last week for organizers of the Fiesta Bowl football game. Williams said they could not give the University of Louisville and University of Alabama, which will play in the bowl New Year's Day, $200,000 to award as scholarships for minority students only. But, he said, the Fiesta Bowl itself, which receives no federal funds, could award such "race exclusive" scholarships, Williams said.

In general, Williams was relying on the Civil Rights Restoration Act of 1988, which was passed over President Ronald Reagan's veto. The law says a college accepting federal funds may not discriminate

See SCHOLARSHIPS, A28, Col. 1

[redacted]

THE WASHIN

Education Dept. Ruling Splits Administration

SCHOLARSHIPS, From A22

in any of its programs, even if they are privately funded.

"The source of the funding is irrelevant," Williams said after sending a letter to Fiesta Bowl organizers last week.

Many public and private colleges have scholarships designated for minorities. Columbia University has a program for minority students begun in 1987 with a gift from John Kluge, the Metromedia executive. St. Louis University began offering 25 scholarships for black students this fall, and Washington University said it has six merit-based programs that aid 50 minority students.

William H. Danforth, Washington's chancellor, said yesterday the school would continue the programs because "we have a commitment to those students" and the Education Department has issued no regulation, proposed or final.

Several states, including Iowa, New Mexico and Florida, also fund scholarships for minority students.

"We now have certain states that have special financial aid programs for minorities. I wonder how they're going to rule on that?" said Richard F. Rosser, president of the National Association of Independent Colleges and Universities. "This is really a complex mess."

Elizabeth Sweeney, Florida's administrator of student assistance programs, said the legislature has funded special scholarships for Seminole Miccosukee Indians, students "of Hispanic culture," minority law students at the University of Florida and Florida State University, and minorities who attend one of four historically black colleges in the state.

The Florida Department of Education, where Sweeney works and which administers a variety of federal programs, also awards $150 scholarships from a private trust fund to descendants of Confederate Army or Navy veterans. She said those scholarships were not discriminatory because "there were some black Confederate soldiers."

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In the Eye Of Racial Controversy

Education Official's Action Shocks Some

By Barbara Vobejda
Washington Post Staff Writer

MICHAEL L. WILLIAMS
. . action on scholarships alarms some

As a young lawyer at the Reagan Justice Department, Michael L. Williams was known for his aggressive prosecution of racial crimes.

He won awards for his handling of a case involving white supremacists in North Carolina, a case his supervisor said inspired death threats against him. He prosecuted a white supremacist in Idaho who had harassed the children of black and interracial families. He tried a Kentucky Klansman accused of firebombing the home of a black family and he won police brutality cases in Alabama and Arizona.

Now, as assistant secretary for civil rights at the Education Department, Williams, 37, finds himself in the middle of a very different kind of racial issue. His announcement Wednesday that colleges awarding scholarships solely on the basis of race would be denied federal funding has prompted bitter criticism from education and civil rights groups.

To those who have worked with him, there is no inconsistency in the two positions. As one of a handful of black conservatives who have served in the Reagan and Bush administrations, he is committed to fighting racial prejudice at the same time philosophically opposed to many of the conventional methods that have singled out minorities for special treatment.

"That Mike would be instrumental or involved in that decision is not a surprise to me," said Charles Cooper, an attorney in private practice who served as deputy assistant attorney general in Reagan's second term. "It certainly is in keeping with my understanding of his approach."

But civil rights advocates, who had seen Williams's appointment as a hopeful sign that the Bush Administration would depart from what they saw as the dismal record of the previous administration, the decision on college scholarships was a shock.

"Perhaps I misread him," said Suzanne Ramos, a lawyer with the Mexican-American Legal Defense and Educational Fund. "Perhaps he's a very good politician."

Ramos said Williams invited her to meet with him shortly after his confirmation last summer and, at the time, she was optimistic and encouraged at his knowledge and interest in bilingual education and other civil rights matters.

"We were impressed that he had actually called us and asked to meet with us," she said. "He was very personable, warm, friendly . . . . was optimistic about Mr. Williams." But his new policy on scholarships, she said, "was very dismaying."

Williams, who declined through a spokeswoman to be interviewed, joined the Justice Department's civil rights division in 1984. After four years in the division, he was a special assistant to Attorney General Dick Thornburgh and served as deputy assistant secretary for law enforcement in the Treasury Department before coming to the Education Department.

Williams began his career as a lawyer in his hometown of Midland, Tex., after earning his law degree, a master's and a bachelor's degree from the University of Southern California.

Those who have worked with Williams describe him as open, friendly, politically savvy, with a keen legal mind and a ready wit.

"His accomplishments and advancement in government [are] no accident," said Cooper. "He's got the tickets."

Others said his assignment to prosecute white supremacists and other cases of racial violence signalled that he enjoyed the confidence of his superiors.

"Those are tricky cases, even if the defendants are really bad actors," said Michael Carvin, who worked at the Justice Department with Williams and is now in private practice. "He had a good reputation."

At his confirmation hearing in May, Williams, who lives in Falls Church and is married to Donna Nelson Williams, a mechanical engineer, was asked by Sen. Paul Simon (D-Ill.) why he did not belong to the NAACP, the Urban League or other organizations "that have been championing the causes that your office really ought to be championing."

Williams answered that those groups did not have chapters in Midland, but that he had been one of three founders of a black student association at his university.

"What I am groping for in this," said Simon. "I want someone who is going to show the muscle and the backbone to really stand up and do a job."

"The question sort of goes to the fire burning in the belly," Williams responded. "It does and I think it has . . . . I think in the early part of my career, when I was a tad bit younger than I am now, I have shown that the fire has burned in the belly."

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By [illegible]—The Washington Post

Nikki Tarlton, left, and Kimberly Boulware attend U-Md. with aid of scholarships.

'Chilling Effect' Feared

Area Colleges Say Ban Imperils 4,000 Grants

By Amy Goldstein and Mary Jordan
Washington Post Staff Writers

More than 4,000 college students in the Washington area risk losing their scholarships under a new U.S. Department of Education ruling that forbids most schools to award financial aid solely on the basis of race, state and campus officials said yesterday.

In Maryland, Virginia and the District, students and administrators complained that the new policy could undermine years of efforts to attract more minority students at a time when they are increasingly underrepresented in higher education.

Virginia Gov. L. Douglas Wilder sent a letter yesterday to President Bush asking him to reverse the department's decision and contending that the ban on "race exclusive" scholarships would have a "chilling effect" on all minority education programs.

"If you want them to stop coming, just stop the money," said Ulysses Glee, financial aid director at the University of Maryland at College Park, where 318 students are on minority scholarships this year.

Maryland and Virginia, both required by federal officials to desegregate their college systems, award about 1,600 students nearly $2.5 million in minority scholarships each. Many private colleges and universities in the region, including the District, also use grants to recruit minorities.

College and university administrators said the Education Department's directive was so ambiguous

See STUDENTS, A23, Col. 4

College Officials Attack Scholarship Ban

STUDENTS, From A1

that they could not determine exactly how many scholarships they would have to eliminate.

The policy, announced this week, exempts scholarships that are part of court-ordered desegregation strategies. The Bush administration has not clarified whether the policy would affect students currently getting aid, or how strictly the policy would be applied to aid based partly on a student's race. College officials say they are still confused about whether privately funded grants would be subject to the ruling.

Institutions that violate the ban could, in extreme cases, forfeit all federal subsidies, including other student aid and research grants.

For Kimberly Boulware, the stakes are more personal.

Boulware, a College Park senior from Greenbelt, said she chose the school because she won a Banneker Scholarship, a grant that pays full tuition and fees for talented black students. A government and politics major, she has applied to five law schools, all of which offer special scholarships for minority law students.

Without a Banneker Scholarship, she would not have been able to afford College Park, she said, and without a scholarship next year, she will not be in law school.

"I am very certain I would be working and not going until I can pay for it," said Boulware.

"Colleges like Maryland use scholarships to recruit," said Nikki Tarlton, another Banneker Scholar at College Park. "It'll be hard to recruit minority students if there aren't these scholarships."

High school students said yesterday that the federal ruling could influence their plans, too.

"So many of the kids I know who went to university got there because of these kinds of scholarships," said Carla Brown, 17, a senior at Eleanor Roosevelt High School in Prince George's County. "I'm from a single-parent family, and I was expecting to use the same scholarships."

If they are unavailable, she said, she probably will apply only to predominantly black colleges instead of to George Washington University, as she has planned.

In Maryland, officials said they believe minority students at public schools are not in immediate danger of losing aid because the state remains under a college desegregation agreement with the federal government.

Although the plan expired in June, the Education Department's Office for Civil Rights is unlikely to rule on whether Maryland's public institutions have satisfied enrollment goals for at least a year, according to George Funaro, Maryland's deputy higher education commissioner.

[redacted]

If Maryland is released from desegregation requirements, Funaro said, "there is a distinct possibility we would be vulnerable."

Federal officials have found Virginia "in substantial compliance" with a similar desegregation agreement that expired in 1986, but they have not entirely cleared the state.

James E. Lyons, president of Bowie State University, said, "We are dealing with two contradictory federal mandates." Until now, he said, the Education Department has encouraged "other-race grants" as a desegregation tool. As a result, Bowie, a predominantly black Prince George's campus, is paying $300,000 this year in scholarships to 205 white students.

Johns Hopkins University President William C. Richardson said the ban would frustrate private schools' minority recruiting efforts. Hopkins provides special scholarships in several fields, including engineering and music, in which minorities have been scarce.

Barry Dorsey, associate director of Virginia's State Council of Higher Education, called state grants for minorities necessary to attract more such students into higher education. The federal decision, he said "is a change in their philosophy, which has been to eliminate hundreds of years of historical injustice by awarding special scholarships."

For the past three years, Ted Delaney, a PhD history student at the College of William and Mary in Williamsburg, has received a $10,000 annual state grant for minority graduate students. Delaney, formerly the only black teacher in a North Carolina high school, is now one of only two black students in his program.

"There are almost no blacks in graduate schools. I suspect one of the reasons is most people think it is cost prohibitive," said Delaney. "It is extraordinarily important for the students—both for white students as well as black students—to see blacks as teachers and in roles of authority."

William and Mary said it also receives $76,000 from the Education Department for the Patricia Roberts Harris scholarship program for needy minority undergraduates.

About 200 students at the University of Virginia receive minority scholarships, according to John A. Blackburn, dean of admissions.

In light of the ruling, James Madison University in Harrisonburg has put on hold a $25,000 scholarship drive for black students, according to Alan Cerveny, director of admissions.

In the District, the financial aid director at American University said the school might have to abolish its Frederick Douglass scholarships, a program more than a decade old that gave grants totaling $1.1 million to 138 black undergraduates this year.

While Howard University, a historically black school, does not spend any of its own money on grants based on race, it does receive private money for such scholarships. A university spokesman said he was unsure how those would be affected.

George Washington University has four kinds of scholarships, totaling more than $40 million, that are designated for D.C. high school graduates—95 percent of whom are black.

Georgetown officials said they believed the school would be relatively immune from the ban because none of its scholarships is awarded entirely on the basis of race.

Staff writers Stephanie Griffith and Keith Harriston contributed to this report.

Bush Stands Neutral While Aides Debate Scholarship Controversy

By Ann Devroy and Dan Balz
Washington Post Staff Writers

President Bush, his senior aides embroiled in what one aide called a "madhouse" of debate over an Education Department decision to bar most colleges from awarding scholarships based on race, refused yesterday to repudiate or embrace the policy.

One official said much of the president's senior staff lined up on different sides of the issue and a variety of statements were drafted for and against the policy. Secretary of Health and Human Services Louis W. Sullivan, the highest-ranking black in the administration who was described by aides as "very concerned" about the issue, met with White House Chief of Staff John H. Sununu and asked for a role in the policy debate to ensure minority education would not suffer.

Asked whether he supported or rejected the departmental ruling that "race-exclusive" scholarships are discriminatory and violate the 1964 Civil Rights Act, Bush praised the author of the ruling, Michael L. Williams, an assistant secretary of education, and said, "We're looking at it."

The controversial ruling has been strongly criticized by civil rights, education and business community leaders, and for the second day in a row was the subject of inconclusive debate among White House aides, in large measure because some aides wanted the president to quickly and decisively repudiate it.

One official called the White House "a madhouse" of aides preparing and writing statements for Bush to offer, of others objecting and of some "running around half-cocked," according to a third official.

White House press secretary Marlin Fitzwater said that while many Bush advisers "have opinions" on the issue, the president decided he would not take any position without more information. "We are going to take whatever time necessary to do a thorough review and to consider all the legal, practical and political ramifications of this," Fitzwater said describing Bush's order.

The ruling by Williams, apparently made without any consultation with the White House, confronts Bush with an issue conservatives in Congress and in his administration had just begun to look at as part of a broader policy debate over quotas and equal rights.

REP. NEWT GINGRICH
... Bush favors "color-blind" society

Administration officials had anticipated that quotas and affirmative action would emerge as major issues in the next session of Congress, with Democrats pledging to reintroduce the civil rights bill Bush vetoed last fall and continue their attack on the GOP as racially insensitive.

As Bush begins defining his domestic priorities for his third year in office, a pivotal period for determining the issues he and other Republicans will promote and run on in the 1992 elections, some members of Congress trying to formulate a Republican message are examining whether that message ought to include the thesis that federal programs should be totally "color blind." That would mean an end to minority contracting preferences and programs that "set aside" a certain amount of their contract for minorities.

Both Sen. Phil Gramm (Tex.), the newly elected chairman of the National Republican Senatorial Committee, and Rep. Newt Gingrich (R-Ga.), the House minority whip, said in interviews this week that the GOP should consider taking the theme embodied in Bush's veto of the 1990 Civil Rights Act because it was a "quota bill" and expanding it to include a broad attack on programs and policies at any level that provide special treatment for minorities.

Gramm, noting that Democrats and Republicans alike say they oppose quotas, said he might introduce an "equal access" amendment to the civil rights bill the Democrats are expected to introduce that would require federal contracts be open equally to all. "If you are going to say that quotas are wrong," Gramm said, "then you have to go back and think through the whole issue of set-asides."

"I believe George Bush believes in a color-blind, rather than a color-bound America," said Gingrich, who argues set-asides are "color-bound" and thus unfair. Making the case that all Americans should be treated equally, both politicians said, was a powerful political argument.

The White House appears much more hesitant to venture into the politically risky waters of challenging decades of federal policy that recognized economic and education disadvantage and discrimination against minorities by setting aside some contracts for them.

"We're willing to listen to suggestions" on the broader issues, said a senior administration official. "Our feeling now is just send up a [civil rights] bill like the president sent up before" rather than taking a broader approach.

A senior adviser to Bush said the Education Department's ruling on scholarships puts Bush under unexpected pressure to decide how far he wants to go in the debate. "It means he's got to think about it faster than he wanted," he said, calling the unexpected ruling "a wild card in the game."

According to administration sources, White House counsel C. Boyden Gray made the case to Sununu yesterday that Bush needed more facts about the scholarship issue and more time to assess them before taking any action.

Gray was said to argue that Williams's ruling "may turn out to be correct in every respect" and that criticism has been engineered by the civil rights and liberal community and that Bush should not respond to it.

On the other side, sources said, were advisers such as staff secretary James Cicconi, Sununu political aides Ed Rogers and Andrew Card and Cabinet secretary Ede Holiday who argued that the new department regulations sent a damaging political message to minorities that Republicans have been trying to attract.

Fitzwater, acknowledging there were a lot of "emotional" opinions on the subject, said yesterday that Sununu had decided Bush should not move either way until a broader assessment he predicted would take "at least several days" has been completed.

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12/15/90 SATURDAY, NEW YORK TIMES

President Orders Aide to Review New Minority Scholarship Policy

By MAUREEN DOWD

Special to The New York Times

WASHINGTON, Dec. 14 — Trying to quell an angry reaction in education and civil rights circles, President Bush said today that he had instructed the White House counsel to review a Department of Education decision to bar Federal aid to colleges that offer scholarships designated solely for minority students.

"I've asked our staff here to give me a quick readout on that so we can make a determination," President Bush said at a news conference before his departure to Camp David for the weekend.

Racist Intent Denied

Mr. Bush praised Michael L. Williams, the Education Department's Assistant Secretary for Civil Rights, who stunned White House officials and detonated a political bomb when he announced a new policy stating that "race-exclusive" scholarships were discriminatory and therefore illegal.

President Bush said he had looked at Mr. Williams' background and found him "an extraordinarily sensitive, very intelligent person," noting that "I don't think in this case anybody would accuse the person that promulgated those resolutions of doing it on a racist basis."

The President was alluding, in his remarks about Mr. Williams' background, to the fact that the Education Department official is black.

Mr. Williams argued that it is constitutionally illegal to have race-based scholarships. But college administrators and scholarship fund directors, along with leaders in the education and civil rights fields, charged that the decision would undercut painstaking efforts to improve the enrollment levels of minorities at schools.

Since Wednesday, when the new policy came to light, White House officials and Cabinet members have divided into two camps over the issue, engaging in an intense argument about whether it would be best to defend the

Continued on Page 12, Column 1

Bush Orders Review of Policy Barring Minority Scholarships

Continued From Page A1

policy, soften the policy, or "ice it," as one opponent put it.

Many White House officials were alarmed, or "in hysteria," as one put it, that the abrupt announcement had swiftly soured into a political loser for Mr. Bush. Officials were especially distressed that the delicate issue had unexpectedly fallen squarely into Mr. Bush's lap. Whatever decision the President makes is bound to create political problems.

"Politically, it was a dumb move," Lyn Nofziger, the political director in the Reagan White House, told USA Today. "You've gone out and created a situation where black activists and others can say you're taking off after blacks."

The opposition camp prepared draft statements today repudiating the policy for the President, hoping he would renounce it before he left for the weekend, putting the mess behind him. They said, in frantic tones, that it was "Bob Jones University revisited," recalling the controversy when the Reagan Administration tried to give tax exemptions to colleges with discriminatory practices.

They reckoned that Mr. Bush could easily back away from the policy, merely pointing out, truthfully, that the White House had not had a chance to review it before Mr. Williams announced it. "The White House's hands are clean in this," one senior Bush aide said.

Mr. Williams spent several hours in meetings at the White House today and was unavailable for comment.

"It was crazy that Williams was making major policy decisions without a by your leave," said a White House official.

The attempt to ban minority scholarships was particularly damaging to the White House, since it followed Mr. Bush's veto of a major civil rights bill and the statements of William Bennett, Mr. Bush's original choice to head the Republican National Committee, about the party being ready to take a stand against affirmative action and racial quotas in the 1992 campaign.

Those who were upset about the policy included Jack F. Kemp, the Housing and Urban Development Secretary, Louis W. Sullivan, the Secretary of Health and Human Services, Roger Porter, the domestic policy adviser, James Pinkerton, also on the domestic policy staff, James Ciccone and Ed Rogers, aides to John H. Sununu, the chief of staff, and Ede Holiday, the Cabinet secretary.

Still Divided

Mr. Sununu and C. Boyden Gray, the President's counsel, were holding their opinion in abeyance. Richard G. Darman, the budget chief, and William Kristol, Vice President Quayle's chief of staff, argued that the policy was consistent with the President's position in vetoing the civil rights bill. Mr. Bush asserted with that veto that his Administration seeks a colorblind society but that selecting by race or counting by race is wrong.

Mr. Kristol also argued that it is a popular position in America today, as reflected in polls, that Federal money should not be distributed on the basis of race.

By the end of the day, White House officials were still divided about whether the Administration would back away from the policy or merely try to soften it a bit.

Some officials suggested that the President could soften it by arguing that while the use of public money for racially exclusive scholarships is illegal, the use of private money through public institutions for racially exclusive scholarships would be legitimate.

12/15/90
SATURDAY
WASHINGTON POST

Edwin M. Yoder Jr.

Why Not Minority Scholarships?

It isn't hard to imagine why an able official who happens to be black—specifically, Michael L. Williams, chief of civil-rights enforcement at the U.S. Department of Education—might be hostile to affirmative action programs. Sometimes, in some eyes, such programs cast doubt on the legitimate achievements of just such persons as he.

It is hard, however, to imagine why an administration sympathetic to minority aspirations would abruptly change a key policy on minority scholarships without wide and careful consultations. Heck, they might even have consulted George Bush.

We are told that Williams decided on his own that race-designated scholarships are against the law. He discussed the idea informally with "friends" at the White House. But according to the White House press office, the president of the United States was "not aware of the strategy [interesting term, by the way] prior to its undertaking."

Williams's edict is described as a routine adjustment to recent Supreme Court rulings. But the issue came to public notice only lately during the comic scramble of colleges playing in the Fiesta Bowl in Arizona to propitiate the gods of political correctness. Since Arizonans recently rejected a statewide Martin Luther King Jr. holiday, the pressure is on to shun sports contests in so benighted a jurisdiction.

Did anyone consult George Bush?

So the contestants vowed to set aside some of their bowl proceeds for scholarships for blacks. Williams immediately warned them that this may violate the civil-rights laws.

In general, the niggling overregulation of colleges and universities in any respect is gratuitous and unsound. It is doubtful that Williams or any other federal official is more competent than college officials themselves to decide who, on what terms, ought to benefit from scholarship funds, however dedicated. If the scholarships were publicly financed, a legitimate question of state action would arise; but even that would not be dispositive.

This sort of meddlesomeness now has a lengthening history, made no more appealing by its whimsicality. A decade or two ago, it was all the rage in federal "compliance" circles to push institutions of higher education, especially public universities, to enroll more blacks and recruit more black faculty. Now one of the natural devices institutions thus pressured chose to meet the new goals is off-limits, unless it responds directly to a legal mandate.

The basic flaw, however, is an absurd rigidity. Why the use of any dedicated scholarships, if privately funded, should be off-limits is more than I can see. If a college offered scholarships only to blacks, say, or youths of Oriental derivation, one could see a case for federal admonition. But such exclusivity is unknown, unless it is at so-called "historically" black institutions, which have enjoyed a special status in the eyes of federal regulators.

It is said that only those scholarships dedicated by race and actually administered by the institutions fall under the Williams ban. In practice, however, few scholarships, save perhaps those for fullbacks or power forwards, are awarded exclusively on the basis of a single qualification—race or any other.

Even where the threshold qualification is race (as it might be musical talent, place of origin, mathematical brilliance, high SAT scores or whatnot), other considerations, certainly academic promise and character, come into play. As they should.

Williams's decree violates the spirit and the seasoned wisdom of Justice Lewis Powell's principle, enunciated in his controlling opinion in the *Bakke* medical-school admissions case: While race cannot be the only standard on the basis of which a benefit is conferred, it may be one of a number. And Powell did not try to tell college administrators exactly how any one consideration should be weighted vis-à-vis the others.

The policy enunciated by Williams is arbitrary, abrasive, intrusive and rigid. A Constitution, said Justice Holmes, needs play in the joints. So does a federal policy that affects so intimately the hopes of young people and the discretion of our colleges and universities.

Officials Had Rejected Analysis Now Used in Ban on Race-Based Scholarships

By Ruth Marcus
and Kenneth J. Cooper
Washington Post Staff Writers

The Education Department, during both the Reagan and Bush administrations, dismissed at least three complaints that scholarships for minorities violate civil rights law, rejecting the legal analysis used as part of the basis for its new decision to bar most colleges from awarding scholarships based on race.

The department told Fiesta Bowl officials in a letter last week that its plans to give $200,000 to the University of Louisville and the University of Alabama for scholarships for minority students would violate Title VI of the Civil Rights Act of 1964, which prohibits racial discrimination by colleges and universities that receive federal aid.

In explaining this departure from the department's long-standing policy, Michael L. Williams, the assistant secretary for civil rights, said it was mandated by Supreme Court decisions, including the 1978 ruling in *Regents of the University of California v. Bakke*. In that case, the court struck down a medical school admissions policy that set aside a specific number of places for minority students.

In response to questions at a news conference Wednesday, Williams said *Bakke* let universities take race into account as a factor in awarding scholarships, but it could not be the sole factor.

In March 1982, the department dismissed a complaint from a graduate student who said a minority tuition fellowship program at the Massachusetts Institute of Technology discriminated against him in violation of Title VI.

"We do not consider it proper to extend the *Bakke* decision from admissions policies to all race-conscious actions by universities," Burton M. Taylor, director of post-secondary education in the civil rights office, wrote to the student.

He said that while "admissions quotas" may result in students being kept out of a university, "the availability of a particular financial aid program does not have such a far-reaching effect."

In another case, in 1983, the department upheld fellowship programs at the University of Denver business school funded by private companies and limited to minority students.

In a March 1983 memo, Jean Standlee, deputy assistant secretary for civil rights, noted that the programs did not keep non-minority students from qualifying for "the major proportion" of financial aid at the school. She said they were "voluntary affirmative efforts that are intended to increase minority representation in specified fields" and were consistent with both Title VI and *Bakke*.

After President Bush took office, the department in September 1989 threw out a complaint that the University of Colorado medical school illegally discriminated against white female students by excluding them from consideration as candidates for the federally funded Patricia Roberts Harris Fellowships.

The regional director for the civil rights office told the university president that restricting the fellowships to black students was "permissible affirmative action" under department regulations implementing Title VI.

That letter came nine months after the Supreme Court's ruling in *City of Richmond v. Croson* overturning a minority set-aside program for contractors. Williams, at a news conference Wednesday explaining the new policy, said department officials were "just law enforcement folks" implementing the *Croson* decision.

The letter to the University of Colorado, however, does not mention the *Croson* case. Richard Komer, a deputy to Williams, said the ban does not apply to federally funded scholarships that Congress has designated for groups that are traditionally under-represented in higher education.

He said the department considers federal legislation establishing those scholarships "in harmony with any other federal statute," including the Civil Rights Act. An Education Department spokesman said neither Williams nor any other official was available yesterday to comment further on the issue.

The ban has stirred an intense debate in the Bush administration and opposition from education, civil rights and business groups concerned about the under-representation of most racial minorities in American colleges.

A civil rights lawyer yesterday questioned whether Williams ignored important facts when he decided the University of Louisville could not accept Fiesta Bowl funds for minority scholarships. In his Dec. 4 letter to Fiesta Bowl executive director John Junker, Williams said colleges could award scholarships based solely on race if "mandated to do so by a court or administrative order, corrective action plan, or settlement agreement."

Janell Byrd, a lawyer for the NAACP Legal Defense Fund, said Louisville appeared to qualify for that exemption.

Gary Cox, executive director of Kentucky's Council on Higher Education, said Louisville, a state college, has been covered by a voluntary desegregation agreement between the state and the Office for Civil Rights since 1982 and that plan has included scholarships for minority students. A Louisville spokesman said 217 minority students attend the school on such scholarships.

Byrd said Williams told her during a brief meeting yesterday that he was about to decide whether to rule that the state has successfully desegregated and no longer needs to take such corrective action.

EDUCATION

Minority Scholarship Fracas Raises a Sensitive Issue

White House and Justice Department officials have begun examining a Bush administration plan, intensely opposed by education and civil rights groups, to bar colleges and universities from giving scholarships based on race.

Michael L. Williams, assistant secretary for civil rights in the Department of Education, said Dec. 12 that "race-exclusive" scholarships discriminated against other students and violated Title VI of the Civil Rights Act of 1964, which prohibits discrimination on the basis of race, color and national origin.

Williams said schools awarding such scholarships risked losing their federal funds.

That announcement, which would reverse more than 20 years of government policy to spur minority enrollment in higher education, unleashed a storm of condemnation. And it raised the explosive issue of affirmation action and reverse discrimination as the 1992 presidential campaign approaches.

But White House officials appeared to back off Dec. 13. White House spokesman Marlin Fitzwater said the president did not learn about the change until he read about it in the newspaper. "We don't have an opinion at this time."

Etta Fielek, director of public affairs at the Education Department, said Williams had consulted with low-level White House officials in deciding to make the change.

If the administration presses ahead with its new interpretation, it is likely to face a court challenge after an administrative review of an individual school's scholarship program.

And Congress could move to block the shift by attaching an amendment to 1991 legislation. One potential vehicle is a renewed bid to pass the civil rights measure. Vetoed by President Bush as a "quota" bill, S 2104 would have made it easier for women and minorities to prove job discrimination. Another vehicle could be the reauthorization of the Higher Education Act. Democratic leaders consider both measures top priorities for the 102nd Congress. *(Civil rights bill, Weekly Report, p. 3810)*

House Education and Labor Chairman Augustus F. Hawkins, D-Calif., who is retiring at the end of this year, will hold a hearing Dec. 19 on the policy change. An aide described Hawkins, a longtime champion of civil rights and access to higher education for minorities, as "not happy."

William D. Ford, D-Mich., incoming chairman of the House Education and Labor Committee, said the panel would examine the policy after the 102nd Congress convenes in January. "I have a problem with the department threatening something that has been in existence for decades," Ford said.

Robert H. Atwell, president of the American Council on Education, a nonprofit association representing the nation's colleges and universities, said he believed the new interpretation is not only "incorrect and misguided" but politically motivated. "It also would represent a giant step backward" for minority students, he said.

David S. Tatel, head of the Education Department's Office of Civil Rights during the Carter administration, said the change appeared to be part of a strategy to make race and affirmative action an issue for the 1992 election year, after it was successfully used in the November re-election of Sen. Jesse Helms, R-N.C. "I can't imagine why else they would take a policy used under both Democrats and Republicans and unilaterally declare it illegal," Tatel said.

The department's announcement came after Fiesta Bowl officials said they would give $100,000 each for minority scholarships to students at the University of Alabama and the University of Louisville, the two schools playing in the annual football game. Civil rights groups had called for a boycott of the game, which is to be held in Arizona, because voters there had refused to make Martin Luther King Jr. Day a state holiday.

In a letter to the executive director of the Fiesta Bowl, Williams wrote that the schools would violate the Civil Rights Act if they accepted the money ■

By Jill Zuckman

DEC 16, 1990 NY TIMES
SUNDAY-

A Learning Experience in Education Policy

THE education President fired his Education Secretary last week just as a new Administration policy on scholarship aid for minority students set off a storm of criticism and confusion in academia.

The new policy, which would deny Federal funds to colleges that award scholarships to minority students on the basis of race, became public the day after the Secretary, Lauro F. Cavazos, resigned following a meeting with the White House chief of staff, John S. Sununu.

The connection, if any, between the departure of Mr. Cavazos and the promulgation of the new policy was at best murky. The White House insisted there was none, but some people close to Mr. Cavazos, who was the first Hispanic Cabinet member, said he was upset by the scholarship policy. In any case, some Bush aides had considered him a candidate for cutting because his low-keyed style was seen as undermining Mr. Bush's professed concern with education.

Jose R. Lopez/The New York Times

Lauro F. Cavazos

But there was considerably less concern in education circles about Mr. Cavazos's departure than about the implications of the new policy, which caught educators, civil rights leaders and, apparently, some top White House aides by surprise. Michael L. Williams, the assistant secretary for civil rights who announced the change, said he was simply trying to bring education policy in line with overall Administration policy on affirmative action, racial quotas and the like.

Caught off guard by the initial round of outrage — a host of leading educators called the new policy variously shocking, obscene and unconscionable — the White House moved to soften reaction by promising what Mr. Bush called "a quick readout" on the implications of the ruling. White House aides stressed that the policy change was not at the President's behest and that it was "easily reversible."

The heads of some education groups argued that enforcing the policy would undercut years of efforts to increase the number of black and other minority students. But others noted that the policy would not affect minority recruitment at the many colleges that actively seek minority students but offer them aid based on need or merit rather than race. In addition, schools under court order to increase minority enrollment would not be subject to the new policy, Mr. Williams said.

Nevertheless it was clearly a genie that the White House wanted back in the bottle. One Republican strategist said that the policy grew out of a "defensible legal position," but that "from a political standpoint it stinks."

CARLYLE C. DOUGLAS

The Region: Page 16

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The Washington Post
AN INDEPENDENT NEWSPAPER

The President and Scholarships

THE ASSISTANT secretary of education who announced last week's new federal approach—now under review—to college scholarships said that he did so to clarify a muddy policy. The clumsiness of the effort, which we did not take sufficient account of in our own initial response, has destructively and hurtfully had the opposite effect. The highly political issue has now gone to the president, who has asked his staff for a "quick readout" in order to be able to settle it. A broader statement of purpose and good faith by the White House is much needed.

The proposed new approach would have much less *direct* effect on the distribution of scholarships—who actually gets them—than many of its critics imply. But we now see that it could, given the political context in which it was undertaken, have a very damaging indirect effect: the signal sent might discourage not only applicants but also institutions that might fear legal or other governmental impediments in perfectly constitutional efforts to channel certain grants to poor minority youths. The apparent new position—the view that in most cases it is probably illegal to reserve scholarships exclusively for minority groups—was announced not with the elaborate care that such a complex subject requires but almost casually, not to say dismissively, in a two-page departmental press release about a letter to the organizers of the Fiesta Bowl football game.

In addition, the department was unprepared—still is—to answer many legitimate questions its venture into the subject raised. As higher education and civil rights groups protested, the notion got abroad that some large number of scholarships might be in jeopardy. Students were understandably frightened, and so, by the end of the week for their different reasons, were some presidential advisers.

No one knows how many scholarships are reserved nationwide for members of minority groups; the number is thought to be sizable. In the past such scholarships were mostly accepted if not encouraged by the government. That was true both where schools were trying to correct past illegal segregation and where they were trying simply for good social and educational reasons to diversify their student populations. The new doctrine, as laid out by Assistant Secretary Michael Williams, is that private parties can *still* earmark scholarships for minority group members if they choose, and so can the federal government; the Supreme Court has shown special deference to Congress on such matters. But colleges (other than those under court or other orders to desegregate) generally can't reserve such scholarships if they receive federal funds as almost all do, because the law forbids recipients of federal funds to discriminate on the bases of race, ethnic origin and the like, and this would be such discrimination. States apparently can't reserve scholarships for minority groups either, though this is one of the areas left unclear.

Mr. Williams says, however, that colleges and states are free to use the familiar proxies—poverty and other disadvantage—to continue to give the same scholarships to essentially the same recipients, and they are free as well in the name of diversity to make race a factor in the awarding of grants; race just can't be the overriding one.

We continue to think that where it is possible to get these students the financial support they need and deserve without writing back into law racial preferences and exclusions that can so easily be turned to ugly purpose, it is an important social value. And we also believe that the scholarship aid that would be affected by the new statement could readily be achieved by other means, such as those we mention above. But there is no easy answer to the critics' continuing objection that Mr. Williams' position would nonetheless make harder what is already one of the hardest problems many colleges and universities face—the recruitment of blacks and members of other minority groups. In part, they any, this is because of the destructive message it would send.

What is that message? In part it is (to black and other minority aspirants) that the government and society at large don't care about their aspirations and won't help. But in part it is also a message to the white majority: the distorted notion that, abetted by government, some large body of unqualified minority applicants is busily snatching away valuable positions that the majority deserves and would otherwise get. This is as unfounded as it is hurtful. The president needs to set the matter straight.

The Washington Post

AN INDEPENDENT NEWSPAPER

Scholarship Flap: Part of Larger Battle

Racial Preference Issue Causes Sharp Divisions Over Legal Intent

By Ruth Marcus
Washington Post Staff Writer

The controversy over the Education Department's decision prohibiting most colleges from reserving scholarships for minority students is the latest round in a long-standing national debate over the use of racial preferences designed to help disadvantaged minorities.

On one side are those who contend that the Constitution and federal civil rights laws envision strict colorblindness, prohibiting any differing treatment based on race. This group, which supports the Education Department's position, sees even "benign" racial classifications as repugnant to civil rights laws and the constitutional guarantee that all citizens are entitled to equal protection of the laws.

On the other side are those who take the position that, as Supreme Court Justice Harry A. Blackmun wrote in a 1978 opinion, "In order to get beyond racism we must first take account of race." This side looks at the country's history of slavery and decades of discrimination against minorities and believes that some race-based preferences are not only justified but necessary to eradicate the continuing effects of such treatment.

The fight has been played out earlier over such issues as school admissions quotas, government set-asides for minority businesses, and affirmative action efforts by governments and private employers.

The debate over minority scholarships comes at a time when the law on affirmative action is in a state of flux, as the Supreme Court, always split by the subject, appears to be growing increasingly conservative.

To those who support the Education Department's position, a reversal of the position it has taken since the Civil Rights Act of 1964 was passed, the meaning of that law and the Constitution is clear: There should be no discrimination, even if well-intentioned, in any of a college's programs, including financial aid.

The law and regulations "are crystal clear that such race-based scholarships are prohibited," said John Scully of the Washington Legal Foundation, which filed complaints with the department in May about scholarship programs for minority students at the University of Florida and Florida Atlantic University.

Scully and others point in particular to the court's 1978 decision in *University of California Board of Regents v. Bakke* to strike down a medical school program that set aside a specified number of places for students from minority groups. The justices said then that race could be taken into account as one factor in promoting a more diverse student body.

"It seems to me the case is rather impregnable against these kinds of scholarship programs," said conservative legal scholar Bruce Fein. "At best, under *Bakke*, you could add race as a 'plus' factor in competing for the scholarship funds. These aren't 'plus' factors; these are quotas in the sense they had quotas in *Bakke* that were overturned."

Scully said a Supreme Court decision two terms ago in *City of Richmond v. Croson* that struck down the city's program reserving 30 percent of contracting work for minority businesses "puts another nail into that structure of civil rights law to make it even more clear, to hammer through that in fact race-exclusive scholarships are impermissible."

Those who oppose the Education Department's move say that when Congress in the civil rights legislation prohibited racial discrimination in higher education, it intended to protect minorities from being excluded from such financial aid programs, not to invalidate measures that give minorities an extra boost.

They cite the department's longstanding interpretations of the law and note that Congress has had ample opportunity to correct the situation if it meant to disallow race-exclusive scholarships.

"You could literally number in the thousands the number of people in the government who knew this went on and knew of Title VI [the relevant section of the civil rights law] and never dreamed this was unlawful," said Eric Schnapper of the NAACP Legal Defense and Educational Fund.

Marcia Greenberger of the National Women's Law Center said the Education Department's approach failed to take into account the "overall scholarship picture" in which, for example, scholarships set aside for the children of alumni could exclude many minority students.

David S. Tatel, who headed the department's civil rights office under President Jimmy Carter, said that in assessing the legality of race-exclusive scholarships the office traditionally has looked at "the scholarship program as a whole, not at the individual pot of money, and if a modest pot of money is set aside for minorities in the context of an overall scholarship program that's available to all students, then the program itself is not discriminatory."

He distinguished scholarships from the admissions quotas that were at issue in *Bakke*, because "the scholarship decision in terms of who gets money and how much is not as important to the individual as the admissions decision."

Likewise, Tatel said, the ruling on special treatment of minority contractors would not automatically invalidate scholarships designated for minorities because "the impact on a white student here is significantly less than the impact on a white contractor in Croson who is denied a contract." In addition, he said, the court has said universities "can constitutionally take race into account to promote diversity and that's what they're doing."

Minority Awards Tied to Need Likely to Survive, Kemp Says

Associated Press

Secretary of Housing and Urban Development Jack Kemp predicted yesterday the Bush administration will find a way to preserve minority-only scholarships that are linked to students' financial needs.

The White House and Justice Department are reviewing a controversial opinion from the Education Department's top civil rights official that said most race-based scholarships are illegal.

Kemp, speaking on CBS's "Face the Nation," said, "Like most Americans, I don't believe in race-based or religious-based quotas."

But he added, "I do believe in affirmative efforts by colleges to open up opportunity to minorities and low-income people."

"It would be a mistake for the federal government to shut off federal aid to a college . . . because it's trying to promote opportunities for minorities based on need and minority status," he said.

Ruling Highlights a Rift Among Blacks

By KAREN DE WITT
Special to The New York Times

WASHINGTON, Dec. 16 — The announcement that the Government considers scholarships based solely on race to be illegal has highlighted a rift between established civil rights groups and a small but growing number of blacks who question whether members of racial minorities should get preferential treatment.

The decision by Michael L. Williams, Assistant Secretary for Civil Rights in the Education Department, on the scholarships stunned the education establishment, infuriated civil rights groups and moved Mr. Williams from being a well-regarded but obscure official to a political lightning rod.

The decision also surprised President Bush and the White House, and with an eye to already strained relations with black voters, Mr. Bush ordered a review of Mr. Williams's action. Some Administration officials predicted that the President would reverse or water down the policy this week.

In an interview last week after the policy became the center of attention in Washington, Mr. Williams said his decision came about solely by "looking at the law," the Civil Rights Act of 1964. "We should start with the general principle that significant decisions should not be based on race," he said. "There is no grand design to all this. For good or bad, this is me."

Michael Geissinger for The New York Times

"We should start with the general principle that significant decisions should not be based on race," said Michael Williams, assistant secretary for civil rights in the Education Department. Last week the Government ruled that scholarships based solely on race are illegal.

Debate on Affirmative Action

But whether or not Mr. Williams intended it, his decision raised more heated debate among blacks over whether affirmative action policies, intended to correct historical segregation, have instead created an unfair racial privilege.

Kay James, a black who is a former Assistant Secretary for the Department of Health and Human Services, said the principles behind Mr. Williams's ruling "resonate very well within the black community because most African Americans don't want race-based preferential treatment."

She added: "We want a level playing field, and once given that we can compete very well given that we have the intellect, the skills, the experience to accomplish anything we want. We would have rather decisions based on that rather than race."

But Janell Byrd, assistant counsel with the NAACP Legal Defense and Educational Fund, said that few blacks shared that position.

"Our phones have been ringing off the hooks with protests from everyone from cab drivers to civil rights organizations," she said. "I think that it is fair to say that Mr. Williams doesn't represent the black community."

Mr. Williams, who is black, played down the impact of his policy, pointing out that the ruling does not affect federally backed programs for minority members, private grants directed at minority members or scholarships directed at correcting past inequities.

"I've said on a number of occasions, it is not minority scholarships that are illegal," he said, "but race-exclusive scholarships. If we base financial aid on merit and need, think about who are going to be the neediest applicants on campus. For the most part they're going to be minority students."

A scholarship decision and a debate about racial privilege.

Way to Preserve Scholarships

Housing Secretary Jack F. Kemp said today that Mr. Bush would find a way to preserve race-based scholarships that are linked to students' financial needs. Speaking on the CBS News program "Face the Nation," he said that Mr. Williams's interpretation of the law did not rule out scholarships based on race and financial need. "I think that is what ultimately is going to be the case," he said.

Mr. Williams said he discussed the policy with low-level staff members and cleared it with Education Secretary Lauro F. Cavazos and the department's legal office, but did not seek White House approval. Mr. Cavazos resigned last week, but Administration officials said there was no connection between the scholarship decision and Mr. Cavazos's departure.

Mr. Williams said his decision on the scholarships reflected one of several priority issues for his office, including discrimination in admissions, discrimination against minority students with limited English, racial harassment on college campuses and sexual discrimination in intercollegiate athletics.

Mr. Williams's agenda was welcomed earlier this year by civil rights and education groups who viewed his arrival as a fresh wind in a moribund agency. But these groups say his latest action aligns him politically with the conservatives who dominated the Education Department during the tenure of former Secretary William J. Bennett in the Reagan Administration.

Mr. Williams's decision comes on the heels of other actions by the Bush Administration that have upset some black voters. Earlier this year, Mr. Bush vetoed a civil rights bill, contending that it would force businesses to impose racial quotas, an assertion that Democrats denied. The issue of quotas was also prominent in this year's election campaigns in North Carolina, Louisiana and California, as Republican candidates sought to paint Democrats as proponents of employment policies that give unfair advantage to women and minority members.

'Help Us Discern Racists'

Some black conservatives argue that racially based scholarships must be reexamined or they will become the focal point for resentment by white voters during an economic downturn.

"It's a good thing in a sense that there's an attack on quotas," said Walter E. Williams, a black economist at George Mason University, "because it will help us discern racists around the country who use these things for their causes. A lot of whites couldn't get a scholarship under any circumstances, but a racist will be able to exploit the present situation by saying, 'You weren't able to get one because they're giving them away to blacks.'"

He also suggested that the debate over racial quotas and preferences diverts attention from other issues. "If the black civil rights establishment cares anything about black kids being on campus, they would better focus their attention on the grossly fraudulent education going on in schools," said Dr. Williams, who is not related to the assistant secretary.

"The paucity of black kids on college campuses has less to do with racial discrimination than it has to do with them being ill-prepared by the public schools," Dr. Williams said.

Others, like Shelby Steele, a black scholar whose criticism of affirmative action has received wide attention in the past year, say racial preferences diminish the achievements of blacks, whose gains are tainted by the appearance of favoritism.

Robert L. Woodson Sr., the founder of the National Center for Neighborhood Enterprise, a nonprofit organization in Washington that helps low-income people take over public housing, lamented that Republicans and conservative whites with dismal civil rights records are the ones raising the issue of civil rights and affirmative action. He argued that that stifles legitimate debate among blacks on civil rights strategies.

"If we are disappointed that Williams and a Republican Administration is raising these kind of challenges, then we ought to raise these challenges ourselves," Mr. Woodson said.

Mr. Woodson said civil rights groups should look again at whom their policies help. "To say we've got 15 slots for blacks and then not have any other definitions doesn't pit white against black, it pits upper-class blacks against low-income blacks," he said.

But Gov. L. Douglas Wilder of Virginia, a moderate politician seen by many as representing a new black pragmatism, said the scholarship programs "have accomplished much toward providing increased access for minority students who seek to pursue higher education."

In a letter to Mr. Bush on Thursday, Mr. Wilder said Mr. Williams's ruling would have "a chilling effect on all minority-targeted programs," and he urged the President to reverse the policy.

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JONATHAN YARDLEY

A New Wheel on Bush's Bandwagon

Make no mistake about this: The question of "race-exclusive" scholarships for college students is difficult, complex and ambiguous, not to mention scarcely susceptible to easy or final answers. But make no mistake about this, either: If there's a way to reduce the issue to its most oversimplified form, to turn it into an emotionally charged political football, the cynical men of the Bush White House will find—and then exploit—it.

Whether this process already is underway seems to be known only to those who may or may not engineer it, and they aren't talking. By the same token, whether the policy declaration on minority scholarships by an assistant secretary in the Department of Education represents broad Bush policy or merely one man's opinion seems at this point to be undecided; a report in The Washington Post late last week suggested that the White House can't decide whether to climb aboard the bandwagon built for it by Michael Williams or to find another ticket to ride.

All of which is to say that the political ramifications of the issue are a long way from resolved, and they won't be until the Bushies determine precisely how desperate they're going to have to be in order to hold on to the White House two years hence. But the betting here is that they watched this year's North Carolina senatorial race with more than passing interest, and that they went to school on Jesse Helms's contemptuous use of "quota" and "affirmative action" charges to fend off a vigorous challenge by Harvey Gantt.

The message from North Carolina was that racial fears are as deeply entrenched as ever and that, just as in the glorious past, they can pay rich political dividends. Who is so naive as to doubt that George Bush, who played them like a Stradivarius in the 1988 presidential campaign, will decline to stoop to them once more in 1992? And who, moreover, can doubt that in the "race-exclusive" issue he and his water-carriers sense the makings of what Ralph R. Smith, a professor of law at the University of Pennsylvania, calls "Willie Horton goes to college"?

The only problem is that the question of scholarships based on race isn't exactly an affirmative-action issue and certainly isn't a quota issue. Scholarships specifically designated for blacks or members of other minority groups don't raise the specter of government coercion and don't deny whites, or anyone else, their "rights." They are intended purely and simply to make college education more generally available to people who in the past have been denied it either by racial discrimination or economic need; they are an important weapon—in the minds of some an absolutely essential one—in the effort to make higher education genuinely "open," so to eliminate them on the grounds of legal nicety would be both stupid and mean.

These, mind you, are the words of one who firmly opposes virtually all affirmative-action programs and to whom the mere idea of quotas is anathema. Hiring or promoting someone solely for considerations of race or ethnicity or sex is utterly objectionable in my view, all the more so if it is at the expense of someone else who is more qualified for the position; the same goes for mandating that a specific percentage of anything—jobs, college admissions, journalistic assignments, whatever—be set aside for persons of any race, ethnicity or sex. In a meritocratic society, which ours at least purports to be, to give anyone a leg up for reasons irrelevant to merit is, as we used to say in the late and unlamented 1960s, un-American.

But these are not the issues raised by Michael Williams's interpretation of the Civil Rights Act of 1964 and subsequent Supreme Court rulings on racial issues. He contends that under the prohibition of racial or ethnic discrimination by federally funded institutions, it is illegal for a college or university to award scholarships on the basis of race or ethnicity—that this constitutes a form of racial discrimination, even if not in the received sense of the term, that is barred by federal law.

In the narrowest sense Williams probably is right, but in the spirit of the law he is dead wrong. Even if one accepts that the evolution of American society since 1964 has changed the definition of racial discrimination—if one accepts that it is possible to discriminate against whites as well as blacks—it remains that the overriding purpose of that year's law, as well as the Voting Rights Act that followed a year later, was to provide legal protection for blacks against discrimination both de jure and de facto; to interpret it now as providing protection for whites against nonexistent denials of their "rights" is, to say the least, a fanciful reading of both the law itself and the history of its enactment.

The truth of the matter is that the existence of "race-exclusive" college scholarships is attributable not to a campaign to deny educational aid to whites but one to make it available to people who in the past have not enjoyed it. For so long as scholarships have existed, colleges have used them not merely to help the most intellectually deserving but also to serve other ends; just as tax policy exists to do more than raise revenue, so too scholarship policy exists to do more than reward brainpower.

Leaf through any college catalogue or prospectus and you'll find, where scholarships are listed, a remarkable variety of offerings. To be sure many are linked to particular areas of academic expertise, but others are narrow in different ways: aid for students from specific states or cities or regions, for graduates of certain secondary schools, for children of employees of individual corporations or other institutions.

The sources of these scholarship funds vary as widely as do the scholarships themselves, but all of them are designed to single out young people for aid not solely because of their intellectual ability but for reasons that, it can be argued, are essentially extraneous to the classroom. No one objects to these; if students from Philadelphia have ever complained about financial aid earmarked for students from Pittsburgh, word of their uprising has yet to reach me. No one has suggested, at least to my knowledge, that these scholarships discriminate against anyone or that by giving aid to students who fit certain descriptions they deny it to those who do not.

The same goes for "race-exclusive" scholarships. Their purpose is not to restrict the opportunities of whites but to enlarge those of blacks. Until quite recently higher education in this country was, outside the predominantly black institutions, pretty much a lily-white affair. Then it got religion in the 1960s and 1970s—largely because of pressure from the federal government—and began to look for ways to attract students from minority groups, blacks in particular. Sensibly enough, it turned to scholarships, both because blacks tend to need financial help more than whites and because offering such aid is a way of competing among schools for the best students from any group, whatever its particular nature, that happens to have been targeted.

This was, in the minds of most people, a Good Thing: a useful instrument not merely for the diversification of higher education but, of far greater importance, for the education of able black students and thus for the expansion and reinforcement of the black middle class. But then Michael Williams came along to raise his exceedingly narrow objection, and suddenly everyone is crying discrimination where no one even knew it existed.

That's because it didn't and doesn't. But be that as it may, the legitimacy of "race-exclusive" scholarships is likely to be determined not by the facts of the case or by reasoned discussion, but by the political exigencies of George Bush. If 1988 is any guide—and why shouldn't it be?—the outlook is not promising.

New York Times

Devastating Signal to Minority Students

Can colleges receiving Federal funds legally award scholarships based on race — even when their purpose is to recruit minority members who might not otherwise apply? Michael Williams, the Department of Education's Assistant Secretary for Civil Rights, says no. As law, that may be defensible. But as education and social policy, it's not.

Some critics charge that Mr. Williams seeks to inflame the debate over affirmative action. That may not be his purpose. But the Bush Administration needs to consider promptly the discouraging signal he sends to the nation's minorities.

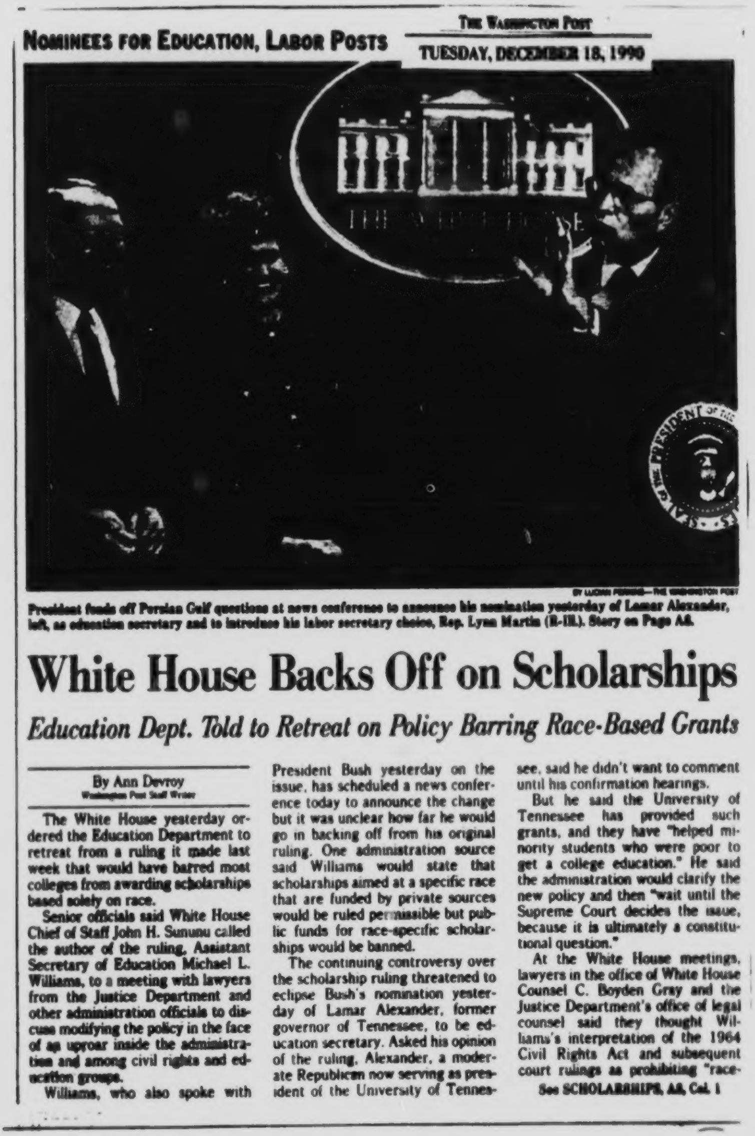
For two decades, colleges have set aside special scholarship money to attract qualified minority students. These special funds are probably only a small fraction of the total financial aid. But they're vitally important to recruiters trying to convince minorities that money is available — especially recruiters from expensive private schools. They're equally vital to minority alumni who wish to boost minority enrollment.

A handful of complaints have been lodged with the Education Department's Office for Civil Rights, charging that these funds discriminate against whites. But it was an attempt by organizers of the Fiesta Bowl in Arizona to set up minority scholarship funds that prompted a general policy statement from Mr. Williams. The organizers had sought to blunt outrage at Arizona's refusal to recognize Martin Luther King Jr.'s birthday as a public holiday.

Mr. Williams told the organizers that Federal law prohibited colleges, most of which receive some form of Federal aid, from maintaining race-exclusive scholarships. Private groups, including foundations, can offer such aid. But unless a college is under court order to remedy past discrimination, it can only use race as one factor in determining scholarship eligibility.

That's a possible, but by no means compelling, interpretation of Federal civil rights law. And in practice, colleges may still be able to award the same amount of scholarship money to minorities based on financial need.

But what ought to trouble President Bush is the devastating signal this verdict sends to minority students struggling to advance themselves; to college administrators committed to diversity, and to minority communities that look to Washington to insure equal education opportunity.



NOMINEES FOR EDUCATION, LABOR POSTS

THE WASHINGTON POST

TUESDAY, DECEMBER 18, 1990

BY LUCIAN PERKINS—THE WASHINGTON POST

President fends off Persian Gulf questions at news conference to announce his nomination yesterday of Lamar Alexander, left, as education secretary and to introduce his labor secretary choice, Rep. Lynn Martin (R-Ill.). Story on Page A6.

White House Backs Off on Scholarships

Education Dept. Told to Retreat on Policy Barring Race-Based Grants

By Ann Devroy
Washington Post Staff Writer

The White House yesterday ordered the Education Department to retreat from a ruling it made last week that would have barred most colleges from awarding scholarships based solely on race.

Senior officials said White House Chief of Staff John H. Sununu called the author of the ruling, Assistant Secretary of Education Michael L. Williams, to a meeting with lawyers from the Justice Department and other administration officials to discuss modifying the policy in the face of an uproar inside the administration and among civil rights and education groups.

Williams, who also spoke with President Bush yesterday on the issue, has scheduled a news conference today to announce the change but it was unclear how far he would go in backing off from his original ruling. One administration source said Williams would state that scholarships aimed at a specific race that are funded by private sources would be ruled permissible but public funds for race-specific scholarships would be banned.

The continuing controversy over the scholarship ruling threatened to eclipse Bush's nomination yesterday of Lamar Alexander, former governor of Tennessee, to be education secretary. Asked his opinion of the ruling, Alexander, a moderate Republican now serving as president of the University of Tennessee, said he didn't want to comment until his confirmation hearings.

But he said the University of Tennessee has provided such grants, and they have "helped minority students who were poor to get a college education." He said the administration would clarify the new policy and then "wait until the Supreme Court decides the issue, because it is ultimately a constitutional question."

At the White House meetings, lawyers in the office of White House Counsel C. Boyden Gray and the Justice Department's office of legal counsel said they thought Williams's interpretation of the 1964 Civil Rights Act and subsequent court rulings as prohibiting "race-

See SCHOLARSHIPS, A8, Col. 1

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White House Orders Education Dept. To Retreat on Race-Based Scholarships

SCHOLARSHIPS, From A1

specific" scholarships was correct, sources said.

But Sununu, backed by White House political advisers and most of the Cabinet, ordered a reversal of the policy on the grounds that it contradicted the president's support for increased educational opportunities for minorities and undercut his efforts to draw more minorities into the Republican fold.

Secretary of Health and Human Services Louis W. Sullivan, the highest-ranking black in the administration, lobbied other members of the Cabinet yesterday to urge the president to revamp the policy and make a strong statement supporting black education.

Secretary of Housing and Urban Development Jack Kemp has already suggested publicly that the policy should be altered, and Attorney General Dick Thornburgh reportedly told Sununu on Friday that Williams's interpretation was only one of several that could be made of the legal precedents and suggested a less radical approach was legally defensible.

Bush again refused yesterday to be drawn into the public debate. Despite statements by a spokesman that he was "disturbed" by the Williams ruling, the president declined to answer questions on the subject.

The Williams ruling aroused an uproar.

Asked whether he wanted the Education Department to alter its ruling, Bush, answering questions on the Persian Gulf at the time, said, "That is off the topic and I won't take the question."

White House press secretary Marlin Fitzwater had said earlier in the day that the president had decided over the weekend that he wanted the Education Department "to take a new look at this."

Fitzwater said Bush was "very disturbed about the ruling in the sense he believes these scholarships are important to minorities and to ensuring opportunity for all Americans to get a good education." Fitzwater added, "I want to make it clear that the president is very concerned about it. He does believe that minority scholarships have been important for economic growth and development, for educational opportunity."

Asked if it were fair to conclude Bush wants the policy reversed, Fitzwater said, "It is being considered." Another senior official said, "We are rolling this grenade back into the Education Department's back yard . . . whence it came. We expect them to dismantle it."

A senior official said Sununu phoned Williams yesterday morning to ask him to the White House. Sununu reportedly suggested to Williams that the timing of his ruling last week, without White House involvement or approval, had put Bush in a politically awkward position.

MICHAEL L. WILLIAMS
. . . to hold news conference today

Asked why the White House did not simply repudiate the Williams finding, a senior official said Bush "knows him and did not want to do that. We are trying to find a way out that does not look like a criticism of Mr. Williams."

Williams, officials said, knows the president slightly but has a longer friendship with Bush's oldest son, George W. Bush. The two have known each other since they were both youngsters in Midland, Tex.

Reuters

Lamar Alexander talking to reporters yesterday at the White House after he was selected by President Bush to be Education Secretary.

White House Retreats on Ruling That Curbs Minority Scholarships

By ANDREW ROSENTHAL

Special to The New York Times

WASHINGTON, Dec. 17 — The White House chief of staff today ordered the Education Department to reverse its ruling on scholarships for minority students, acting on President Bush's instructions to retreat from the politically damaging decision, Administration officials said.

The action today came within hours of Mr. Bush's selection of Lamar Alexander, the former two-term Governor of Tennessee, as the new Secretary of Education. He would replace Lauro F. Cavazos, who was forced to resign last week by the White House. The selection of Mr. Alexander, one of the first governors to champion education reform more than a decade ago, was seen as an effort to revive the department and make good Mr. Bush's pledge to be the "education President." [Man in the News, page B14.]

Debate at Meeting

In a contentious meeting on the scholarship question in his office this afternoon, Mr. Bush's chief of staff, John H. Sununu, overruled officials from the White House, the Justice Department and the Education Department, who argued that the Administration should find a formula that would have the effect of nullifying the ruling against scholarships designated solely for minority students without specifically reversing it, Administration officials said.

Some officials suggested that the Education Department ruling should simply be suspended while a lengthy review was conducted. Others urged language that would let the ruling stand but add restrictions that, in the words of one official, "would take all the legal teeth and political problems out of it."

Instead, Mr. Sununu ordered Federal lawyers to come up with language that would draw a legal distinction between scholarship money that comes government sources and money that comes from private sources. Mr. Sununu argued that this could be presented as something less than an outright reversal, but officials who were unhappy with his decision said that it would be seen that way.

As of this evening, an Administration official said Mr. Bush had not given his final approval to Mr. Sununu's ap-

Continued on Page B14, Column 5

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Administration Retreating Over Minority Scholarships

Continued From Page A1

proach, but the chief of staff wanted to announce a decision on Tuesday in hopes of getting Mr. Bush out of this latest political bind on civil rights as quickly as possible.

Without White House Knowledge

Michael L. Williams, the head of the Education Department's civil rights division, who issued the original scholarship ruling without the knowledge of the White House, scheduled a news conference for Tuesday morning.

Mr. Williams decided that it is illegal for colleges and universities supported by Federal money to give scholarships that are designated solely for minority students.

Mr. Williams argued that even if the money came from private donations, once it is in the possession of a university, it is, in effect, public money. Lawyers from the Education and Justice Departments, led by the White House counsel, C. Boyden Gray, agreed with that assessment.

Although the Bush Administration has strongly opposed quotas or race-specific programs like the ones rejected by Mr. Williams, the ruling deeply embarrassed Mr. Bush, who disapproved of it and learned of it only after it was reported in the press.

Still smarting from criticism of his veto of civil rights legislation earlier this year, the President made it clear that he wanted his staff to find a way to reverse the scholarship policy, while saving as much face as possible in the process, officials said.

Marlin Fitzwater, the President's spokesman, indicated Mr. Bush's position today when he said that the President, who has long been a supporter of the United Negro College Fund and other efforts for minority students, was "very disturbed" by Mr. Williams's decision.

"He does believe that minority scholarships have been important for economic growth and development, for educational opportunity," Mr. Fitzwater said.

Embarrassing Position, Some Say

Some officials argued that the Administration could not simply reverse Mr. Williams's ruling without embarrassment and without appearing to reject Mr. Bush's anti-quota stand. The President vetoed the civil rights bill largely because he believed it would lead to employment quotas.

In discussions over the weekend and in Mr. Sununu's office today, some officials suggested that the White House could suspend the ruling and order a "thorough review," one official said. "Of course, a review can go on forever and meanwhile the old policy would be in place," the official said.

Another suggestion was that the ruling be "redefined" to say that it applied strictly to scholarships that were distributed according to an applicant's race, but that scholarships intended to redress economic imbalances or past patterns of discrimination would be legal, he said.

"Bush's instincts were to be pro-minority access and supportive of Williams at the same time," a senior official said, noting that Mr. Bush telephoned Mr. Williams today to express his personal support for him.

"One way would be to issue a statement that would offer to give technical assistance to universities to make those scholarships need-based and diversity-based in a way that would make sure there was no reduction of minority access," the senior official said.

Mr. Sununu decided that it was possible to draw a legal distinction between money that came from private sources and money that came from public sources and ordered the lawyers to do so, the official said. The chief of staff argued that private money could be spent any way the donor saw fit, the official said.

"At one point, someone said, 'Well what if person X gave money to a university and said it could be used only for white students?' " the official said. "The ruling was that that was O.K. because it would be private money."

The official said that the latest draft of the Administration's new ruling on the issue stipulated that the law "would allow universities, including public universities, to administer scholarships where the donor restricts eligibility to minority students."

'Fairly Progressive Governor'

This debate was the backdrop to Mr. Alexander's selection as Education Secretary. But the former Governor skirted questions about the issue today at a White House news conference.

A longtime associate of Mr. Alexander said: "I would rate Lamar as having been a fairly progressive Republican governor and you can read between the lines on what he says about this question. But he's political enough to know that he's got to move the President's agenda in a way that's got some political sensitivity to it. And there is no way he's going to get himself staked out on a position until he knows the political landscape."

Mr. Alexander was considered as a Vice Presidential candidate in 1988. He was seen as a likely choice for Mr. Bush's Cabinet in 1989, but was passed over in the first round of Cabinet choices.

Your Money:
Saturday,
In Business Day

THE NEW YORK TIMES, TUESDAY, DECEMBER 18, 1990

Educating the Education President

There are many reasons to cheer President Bush's choice of Lamar Alexander, the former Governor of Tennessee, as his new Secretary of Education. Mr. Alexander is a forceful man who may persuade Mr. Bush to take education as seriously as he once promised to do. His appointment will boost morale at a department that lost its sense of mission under the likable but diffident Lauro Cavazos. And he's apt to bring a voice of reason to the raging debate over minority scholarships.

Strapped by huge budget deficits, Mr. Bush has made only a modest down payment on his pledge to be the "education President." He has supported an increase in financing for Head Start and some smaller programs like improving math and science education. But under Mr. Cavazos, the Administration mainly trumpeted the idea of giving parents more flexibility to choose schools, while failing to offer money or a sensible blueprint for improving whatever schools are chosen.

Mr. Alexander understands that reform requires innovation throughout the system. As Governor of Tennessee, he pushed to decentralize authority, to give teachers greater responsibility and better pay in exchange for greater accountability, and to improve basic curriculums. As president of the University of Tennessee, he continued to call for fundamental change.

He also brings to Washington a commitment to equal opportunity. This critical Federal role has been jeopardized by a recent ruling by Michael Williams, the Education Department's Assistant Secretary for Civil Rights. Mr. Williams declared that colleges could not award scholarships on the basis of race, even if their function was to recruit minority students. Race-exclusive scholarships violate Federal civil rights law, he said, and colleges that award them jeopardize Federal aid.

His interpretation surprised the White House, set off a storm of criticism among educators and sent a discouraging signal to minority students. At the insistence of the White House, it's now under review by the Education and Justice Departments.

Mr. Alexander will have only an unofficial voice in this controversy until he's confirmed by the Senate, and it's not entirely clear where he stands. Yet his arrival is welcome: education badly needs stronger friends in this Administration.

114th Year .... No. 14 WEDNESDAY, DECEMBER 19, 1990

Administration Revises Race-Based Grant Rule

President Denies 'Flip-Flop' on Scholarships

By Kenneth J. Cooper
Washington Post Staff Writer

The Bush administration yesterday moved to end a week-old controversy over aid to minority students, promising that no scholarships will be affected for the next four years.

President Bush denied there had been a "a flip-flop" and said the modified policy would "continue these minority scholarships as best we can."

"I've long been committed to them," he said at a news conference with regional editors. "I've long been committed to affirmative action."

The new policy outlined by the Education Department earlier in the day did not completely reverse the regulations announced last week and did not retract the department's contention that "race specific" scholarships are discriminatory. But by imposing a four-year "transition period" it seemed designed to buy the political breathing room White House aides have sought to defuse what Michael L. Williams, the assistant education secretary who initiated the regulations, conceded yesterday was a "firestorm" of criticism.

Williams insisted at a news conference that his initial ruling "was legally correct, supported by current federal law. It was also consistent with most recent practice at OCR [the department's office of civil rights], but it was indeed politically naive."

The new policy he described did not appear to mollify many critics.

"We think the department is confused," said Richard Rosser, president of the National Association of Independent Colleges and Universities. "They really have not thought through what they're doing. We have another interpretation that is highly questionable. The law hasn't changed, the cases haven't changed, all that has changed is Mr. Williams's intepretations."

Williams's original decision last week reinterpreted regulations issued under the Civil Rights Act of 1964 and held that "race exclusive" scholarships were discriminatory. The department has authority to cut off federal funds to colleges that commit such violations.

Williams justified his ruling by

See SCHOLARSHIPS, A8, Col. 1

Education official Michael L. Williams explains new minority scholarship policy.

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U.S. Revises Race-Based Grant Policy

SCHOLARSHIPS, From A1

citing two Supreme Court cases that restricted minority set-asides in medical school admissions and municipal contracts. But civil rights lawyers said the federal government had allowed scholarships based on race since 1964 and that the cases cited by Williams did not apply to student aid decisions.

They pointed out that three times between 1982 and 1989 the department upheld race-based scholarships and rejected or ignored the Supreme Court cases cited by Williams.

His announcement initially came as a surprise to senior White House officials, who had not cleared the decision beforehand, and touched off a heated debate within the administration. White House counsel C. Boyden Gray led the new policy's supporters, who argued it conformed with the "colorblind" approach that conservative Republicans have advocated.

Opponents included Health and Human Services Secretary Louis W. Sullivan, the only black Cabinet member, and other administration officials who argued that Williams's ruling would damage political relations with minorities.

The department yesterday completely reversed itself on the specific issue that spurred the controversy, the plan by organizers of the Fiesta Bowl to donate $200,000 to the two state universities that are scheduled to play in the football game New Year's Day.

The game's organizers had planned to make the donation in an effort to defuse criticism for holding it in Arizona, which has rejected establishing the Rev. Martin Luther King Jr.'s birthday as a holiday. Williams, however, said the organizers could only give the money directly to students. The universities themselves could not participate in awarding the scholarships because they were race-specific.

Yesterday Williams said that colleges that receive federal funds can in fact accept private donations that are specifically earmarked for minority student scholarships. But he said private colleges cannot use their own money for such scholarships and suggested that the Supreme Court has held that public colleges cannot provide them out of state or local government funds.

Such a use of government funds, he said, was a constitutional issue for the courts to decide rather than an administrative issue for his office to handle.

Rosser said he did not understand how privately earmarked scholarships could be permissible, but ones paid for from a college's own funds could not be. "Where in the heavens did he [Williams] get any kind of legal precedent for that?" he said.

Although no data exists on race-based scholarships, Rosser estimated that most are funded by colleges' own funds, not earmarked gifts.

Williams said that because of "the evident confusion" on these issues, some of the restrictions will go into effect for four years "in order to permit universities to review their programs . . . and to ensure that any students under scholarship, or being evaluated for scholarship, do not suffer."

But he said that during this period, the department would continue to investigate any complaints about "race exclusive" scholarships. It was unclear whether enforcement action—which could include a cutoff of federal funds—might result from these complaints.

MICHAEL L. WILLIAMS
. . . first ruling was "politically naive"

Still allowed to offer race-based scholarships, as they were under Williams's original ruling, are colleges under court order to award them to remedy segregation and private organizations that do not accept federal funds. Also exempt are the Patricia Roberts Harris fellowships that Congress has reserved for groups underrepresented in higher education.

Ralph Neas, executive director of the Leadership Conference on Civil Rights, said Williams's initial ruling had embarrassed the administration and now "it seems like Mr. Williams tried to cover that embarrassment with a confusing statement. It's almost purposefully confusing."

Robert H. Atwell, president of the American Council on Education, an umbrella organization of higher education groups, said: "If that was a retraction, it was no retraction. Nice try, but it didn't work. It confused the situation even further."

Benjamin L. Hooks, executive director of the NAACP, said: "We are not totally satisfied with all of the points enunciated by Mr. Williams and take the position that this matter cannot be considered resolved until the status quo is restored."

Conservative activists, who favored the initial ruling, accused the administration of bending under political pressure.

"We think the original policy statement was a correct statement of law, and is a correct statement of law," said John Scully, counsel to the Washington Legal Foundation, which has filed complaints about minority scholarships at the University of Florida and Florida Atlantic University and is considering a suit over yesterday's decision.

"The current press release is a substitution of bad politics for good law," Scully said.

Williams started his news conference with a slip of the tongue, saying: "I'm here today to announce what is a new political, a new, uh, position of the Department of Education."

He denied being pushed by the White House to revise his ruling. "I was not ordered by anyone to overrule anything, and neither was the department," he said. "This decision was reached in a consultative process" that was "a very agreeable, cordial process."

And Williams, who is black, denied being "a lackey" for the white establishment. "I'd like to suggest to you, I haven't been a lackey for anyone. The position I took . . . was a position I took because I thought it was right," he said.

Williams indicated he was surprised by the resulting uproar, saying the department had advised against race-based scholarships on four occasions since 1988. "I didn't sense that this was anything out of the ordinary," he said.

Pressed about how he could be unaware of the extent of race-based scholarships, Williams smiled, tilted his head and replied: "I have a better idea of the extent now."

NEW YORK, WEDNESDAY, DECEMBER 19, 1990

U.S. Lets Stand Curb on College Aid Keyed to Race

Policy on Scholarships Stirs New Criticism By Rights Groups

By KAREN DE WITT

Special to The New York Times

WASHINGTON, Dec. 18 — Stirring a new round of criticism from college administrators and civil rights activists, the Education Department today left intact a key provision of a plan banning scholarships designated exclusively for minority students.

The move was something of a surprise, coming on the day the department had been expected to abandon its objections to racially based scholarships.

Under the policy announced at a news conference today by Michael L. Williams, the department's Assistant Secretary for civil rights, colleges could award such scholarships as long as the money came from private donations designated for that purpose or from Federal programs set up to aid minority students. Colleges would not be allowed, however, to use money from their general operating budgets for the scholarships. This is the source of much of the money private colleges use for minority scholarships.

Under the earlier policy announced a week ago by Mr. Williams, colleges and universities receiving Federal funds would not have been allowed to award scholarships on the basis of race or ethnicity, even if private contributors had earmarked the money for that purpose.

A Line of Distinction

On Monday, the White House insisted that President Bush had been surprised and embarrassed by the announcement of that policy, and officials there said that John H. Sununu, the chief of staff, had ordered its reversal. Several newspapers, including The New York Times, carried articles saying that the policy would be reversed on Mr. Sununu's orders. But the headlines and first paragraphs of some of the articles were overstated. The full articles made clear that Mr. Sununu had told lawyers from the Education and Justice Departments that they might consider drawing a legal distinction between money donated specifically to aid minority students and money that comes from the college's general operating budget. And that is what Mr. Williams did today.

His halfway measure infuriated civil rights groups and seemed to leave Mr. Bush, who has tried to keep the issue at arm's length, less than happy and uncertain about the future course of education policy on minority scholarships.

"I have long been committed to them," Mr. Bush said. "I have long been committed to affirmative action and so I hope the ruling — some of it's quite technical — will accomplish that end.

"But I would like to think that the matter can be resolved with finality this way," he said. "But I don't think that's what we've done. I think there'll probably be some court challenges to this."

Mr. Bush defended today's action and denied it was "a flip-flop." But White House officials said privately

Continued on Page B7, Column 3

Michael Williams, assistant Education Secretary, at news conference.

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Curb on Racially Based Scholarships Is Left Intact

New York Times (12/19/90) B7(3)

Continued From Page A1

that he was unhappy with the outcome and They also continued to say that the Administration did not want to throw Mr. Williams, one of its highest ranking black officials over the side, while at the same time criticizing him for acting without consulting his the White House.

At the news conference today to announce the change, Mr. Williams said that he had been "politically naive" in initiating the initial ruling against all race-specific scholarships.

Before Mr. Williams ruling earlier this month, public and private colleges and universities could use any funds from any sources for minority students scholarships.

Mr. Williams ruled that any "race-exclusive" scholarships were discriminatory and therefore illegal.

Today's announcement states that such scholarships would be permitted if the donor specified that use for the money and it was set aside in separate funds.

"This is not a retraction, it's confusion," said Robert Atwell, president of the American Council on Education. The organization represents 10,000 colleges and universities around the nation. "I think they didn't want to totally lose face. They probably wanted to stick by their guns to some degree for political reasons. They had to do something because of the firestorm. But the firestorm will now continue."

'Just a Softening'

Tom Christensen, associate director of the National Association of Student Financial Aid Administrators, said: "It would be a lot better if they would retract the whole thing. This is just a softening."

Mr. Christensen said that today's action had caused "quite a lot of confusion."

"At what point do donor funds become university funds?" he asked. "My fear is that the ultimate answer — since this is a matter of law — will have to be decided in courts."

At his news conference, Mr. Williams dismissed speculation that because he is black he had been used to float a policy opposed by many civil rights organizations. "I haven't been a lackey for anyone," he said. "The position I took was a position I took because I thought it was right."

He said felt his interpretation had been "legally correct" but that there were other equally valid legal interpretations of the law and that today's announcement came after consultations with the White House. Mr. Williams said he made his original ruling without such consultation.

The Bush administration has strongly opposed quotas or programs that specify race as a requirement in such areas as jobs, schools and housing.

Nonetheless, Mr. Williams's action annoyed Mr. Bush, who said he disapproved of it and learned of the decision only through press reports.

Bush Wants Them Continued

Mr. Bush, at a news conference, insisted that the new policy will "continue these minority scholarships as best we can."

"For now we have worked the regulation so we can continue to have these kids of scholarships," Mr. Bush said. "I've long been committed to them. I've long been committed to affirmative action."

Mary Berry, a commissioner on the United States Civil Rights Commission, however, said that the new ruling invited legal complaints.

"This is an invitation for lawsuits and complaints filed with the Education Department by people who wish to undermine the programs and affirmative action," she said. "This is a wholesale assault on these programs and people shouldn't be fooled."

A legal distinction is drawn on the source of funds.

No Survey on the Number

Richard Rosser, president of the National Association of Independent Colleges and Universities, said: "This is an awful blow to our institutions because the majority of the money that we're using for minority scholarships is not out of endowment funds."

Mr. Christensen said that his organization did not have any data on the number of scholarships or schools affected by the newest ruling.

At the news conference, Mr. Williams said that he did not have any idea of the number either and that his office had not done any survey of the field before he made his original ruling.

Mr. Williams, who came from the Justice Department, said he did not realize his action would create such a "firestorm" of opposition.

He viewed his office as "an enforcement agency" he said, adding, "We just looked at the law straightforward."

Rowland Evans and Robert Novak

Scholarships, Quotas . . .

[illegible]

Richard Cohen

. . . And the Absence of Honesty

[illegible]

THE WASHINGTON POST December 19, 1990

New Scholarship Ruling Caught in Legal Cross-Fire

Policy Questioned in Light of 1987 Civil Rights Law, Supreme Court Equal Protection Cases

By Ruth Marcus
Washington Post Staff Writer

The Education Department's partial reversal of position yesterday on the legality of scholarships reserved for minorities left supporters and opponents of such aid programs unhappy with the result and mystified by the legal basis for it.

The department announced that it would allow colleges and universities that receive federal funds to administer race-exclusive scholarships set up by private donors—for example, the Fiesta Bowl funds that the department said last week would violate federal anti-discrimination law if used for such scholarships.

But, the department said, private universities that accept federal aid may not use their own funds to establish race-exclusive scholarships.

In addition, the department said, there would be a four-year "transition period" for colleges to figure out how to apply the new ruling.

Those who believe that reserving scholarships for minorities does not violate the federal civil rights law were unhappy with the part of the department's ruling barring universities from using their own funds to do so. Those who adhere to the opposite interpretation of anti-discrimination law were chagrined that the ruling allows colleges to accept private funds with racial restrictions.

"That's the dumbest thing I ever heard," Judith Lichtman of the Women's Legal Defense Fund said of the newly announced policy, terming it "gobbledygook which just proves they were attempting to deal with a political problem in a way that makes no sense. It doesn't make any sense to have affirmative action but not do it with your own money."

On the other side of the issue, conservative legal scholar Bruce Fein said the announcement was "about as crass a political judgment superimposed on the law as one can imagine." Referring to the four-year transition period, he said, "I'm surprised that they didn't choose 1992 after the first Tuesday in November. That perhaps would have been a little too conspicuous, but that's obviously what the game is."

Both sides said they could see basis in the law for making a distinction between private funds administered by a college, on the one hand, and the institution's own financial aid funds. Indeed, they said, the Civil Rights Restoration Act of 1987 made clear that an institution that receives federal funds is prohibited from discriminating—if such scholarships are in fact illegal discrimination—in "all" of its operations.

"What it appears that they've done here is attempted to amend the Civil Rights Restoration Act with a press release," said John Scully of the conservative Washington Legal Foundation, which has filed complaints with the Education Department about minority-only scholarships.

The Civil Rights Restoration Act overturned the Supreme Court's 1984 ruling in *Grove City College v. Bell*, in which the court said the federal law prohibiting sex discrimination in "any education program or activity receiving Federal financial assistance" applied only to the specific program, and not to the institution as a whole.

William Bradford Reynolds, who headed the Justice Department's civil rights division during the Reagan administration, said that in passing the Civil Rights Restoration Act, "it was quite clear that the understanding was that if the university received a dollar of federal funds it could not participate in a program" that discriminated, no matter where the money came from.

While civil rights groups do not view such scholarships as discrimination prohibited by federal law, they agreed that the distinction between outside and university funds makes no sense under the Civil Rights Restoration Act.

"The distinction is not one that I've seen recognized in the law anywhere," said Janell Byrd of the NAACP Legal Defense and Educational Fund.

Disagreement also emerged over the Education Department's apparent distinction between private and public institutions. Officials said they interpret Supreme Court decisions on the Constitution's equal protection clause to prohibit public colleges from spending state or local funds for such scholarship programs.

Civil rights organization activists rejected that constitutional analysis altogether.

While conservatives said they agreed with the department's reading of the cases, they said it did not go far enough.

Such an interpretation, conservatives said, would apply to private schools as well because of Supreme Court rulings placing nondiscrimination obligations on private institutions receiving federal funds.

Educators See Need for Diversity on Campus, but Debate How to Achieve It

By MICHEL MARRIOTT

The Bush Administration's struggle to define its stand on awarding scholarships designated exclusively for certain racial or ethnic minorities has prompted a debate in the academic world.

When Michael L. Williams, head of the Education Department's Office of Civil Rights, originally ruled earlier this month that such scholarships were illegal, many educators, social commentators and philosophers were quick to express either delight or dismay.

But now that the Bush Administration has retreated from the policy, fewer of them were willing to discuss it directly. Instead, many preferred to move the discussion toward what they called the underlying issues, saying that these are too pervasive to be resolved by a single policy decision.

These issues, they said, include affirmative action, preferential treatment and the demands for racial and cultural diversity on college campuses in the 1990's.

In recent years, American colleges and universities have increased their academic and financial aid to racial and ethnic minorities who have historically lagged far behind whites in entering higher education. And in the 1980's as Federal aid began to move from grants to loans, many colleges eager to recruit more minority students began to compensate by offering scholarships to them, sometimes out of their own budgets.

Richard F. Rosser, president of the National Association of Independent Colleges and Universities, said the 815 institutions that belong to the association remain dedicated to finding ways for minority students to enter private colleges because society demands it.

He said that colleges have a larger responsibility than simply educating in the classroom, and that they must create "model societies by bringing together diverse people so that they may reason and learn how to live with each other."

Mr. Williams and many of his supporters said that scholarships earmarked for minorities should be recast into financial aid based on need, aiming at students who are from economically disadvantaged families. Many minority students would still be served by this approach, he suggested.

But, according to a report on minorities in higher education prepared by the American Council on Education, a Washington-based higher education association, even middle-income blacks and Hispanic Americans have suffered severe declines in their rates of entering college in the last few years.

'A Crying Need'

By 1988, the report said, "the enrolled-in-college participation rate of middle-income African Americans had fallen to 36 percent, from 53 percent in 1976." Among Hispanic students, the rate was 46 percent in 1988, compared with 53 percent 12 years earlier.

More generally, the number of blacks, American Indians and Hispanic Americans obtaining bachelor's and master's degrees from 1985 to 1987 continued to show large declines, the report said. The report did not come to any conclusions as to why the declines occurred.

Robert Atwell, president of the American Council on Education, said the statistics sketch a distressing vision of the future.

While he said he believes diversity on campus is valuable, Dr. Steven M. Cahn of the City University of New York said: "I don't want to say the most important aspect of any person is that person's race. I think that is a fundamentally mistaken idea."

"You have an unhappy participation rate in the first place," he said. "You have a crying need for minorities in the labor force in the 10 years immediately ahead. And we know that that labor force is going to have a lot of jobs that require a post-secondary education."

That, he said, creates a powerful justification to continue to have effective programs to help minority members afford a college education.

Mr. Williams's decision has drawn more than criticism. There has also been passionate support.

On the NBC program "Today" yesterday, John Bunzel, a senior research fellow at the Hoover Institution, a conservative research organization in California, argued forcefully argued with the president of Xavier University, Norman Francis, that scholarships based on an applicant's race undermine the nation's sense of equality.

Thomas Sowell, author of "Preferential Policies: An International Perspective," wrote in The Wall Street Journal on Monday that the only people who would have been affected by Mr. Williams's decision would be "those few who are not, in fact, needy, but who are trading on color, surname or other ethnic indicators."

Whatever Mr. Williams's intentions, Mr. Sowell wrote, he has opened the subject of equal opportunity versus preferential treatment.

Shelby Steele, an English professor at San Jose State University who often writes about race and society, said, "In principle, it was a valid decision." But, he added, "it came out into a political atmosphere, which made it almost impossible to really look at the real issue."

In his collection of essays, "The Content of Our Character," Dr. Steele describes his dilemma as a black college professor who has two sons who will soon be of college age.

"Their society now tells them that if they will only designate themselves as black on their college applications, they will likely do better in the college lottery than if they conceal this fact," he writes. "I think there is something of a Faustian bargain in this."

In an interview from his California office, Dr. Steele said the Education Department's initial decision tried to develop a policy that recognized a "color-blind society."

More aid to minority members, but still a decline in college enrollment.

"In order to achieve a color-blind society, both whites and blacks have to make sacrifices for fairness," he said. "If something is fair for one group it must be fair for others."

"If preferential treatment is correct, why not a David Duke Scholarship for poor Appalachian whites?" Dr. Steele asked. Mr. Duke, a State Representative in Louisiana, is a former Ku Klux Klan leader who ran unsuccessfully for the United States Senate earlier this year.

What Is Diversity?

Steven M. Cahn, provost and professor of philosophy at the Graduate School of the City University of New York, urged both sides to be more precise in their debate. He said terms like "diversity" need to be more clearly defined.

"There are various respects in which students can be diverse," he said, including age, gender, race, religious affiliation, economic class, military experience and sexual orientation.

"I think that when college classes are put together, when students are chosen, any or all of these might be what is meant by calling for diversity or pluralism," Dr. Cahn said.

While he said he believes diversity on campus is valuable in a democratic society, Dr. Cahn added: "I don't want to say the most important aspect of any person is that person's race. I think that is a fundamentally mistaken idea."

[illegible] of Schools

[illegible] are permitted to [illegible] outside their home [illegible] and provided [illegible]

[illegible] from one district [illegible] students to be transported [illegible] of choice and some [illegible] costs.

STATE	LAW PASSED	PROGRAM EFFECTIVE
[illegible]	1987	1988-89
Iowa	1987	1990-91
[illegible]	[illegible]	1990-91
Nebraska	1989	1990-91
[illegible]	[illegible]	1990-91
Utah	1990	January 1991
[illegible]	[illegible]	1991-92

OTHER STATES

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The New York Times

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The Washington Post A22 Wednesday, December 19, 1990

Turnabout on Scholarships

THE ADMINISTRATION tried yesterday to turn invisible on the divisive issue of reserving college scholarships for minority groups. To quell the controversy its own Education Department created, it reached for a neutral position. A new policy statement was silent on whether the federal government can restrict student aid to minorities, as it does in a few minor programs. It stood off as well from the question of whether state and local governments can impose such restrictions, saying only that the issue had been covered by the courts and was therefore beyond executive branch discretion.

As to universities, its revised view is that under the Civil Rights Act of 1964, they can't restrict aid to minority groups using their own funds but can administer restricted scholarship programs that are privately funded. The administration also has created a four-year "transition" or grace period during which there will be no active enforcement of the new rule. The idea, Assistant Secretary of Education Michael Williams said at a news conference, is not to put any student or university at immediate risk. This should be reassuring.

The main shift yesterday from what Mr. Williams had announced before had to do with university programs. He had earlier said they could not administer scholarships even privately financed for minority groups only, but most could have gotten around that ban, as even protesting higher education officials conceded. As Mr. Williams himself originally suggested, they could change the terms of the scholarships, give them to needy or otherwise disadvantaged applicants and achieve the same result, and they remained free in the name of diversity to make race or a comparable factor one consideration in the awarding of aid; it could just not be the overriding one. Mr. Williams, who issued the revised policy at the direction of the White House, continued to say yesterday that "I think we must be very careful about making any decisions, significant decisions, in this country that relate to individuals based upon race." He is right about that. He also said he had been "naive" in the earlier declaration of policy, and on that he's more than right.

Increased access to higher education is one of the great equalizers in this society. No administration should oppose it, and no administration can afford to appear to be an opponent. Any policy statement on scholarships needs to be set in the cement of commitment to this goal. There is still more for the administration to say on this subject.

Education official plays hooky; panel won't buy excuse

By Carol Innerst
THE WASHINGTON TIMES

Michael L. Williams

The Education Department's beleaguered Michael L. Williams stood up a congressional committee yesterday to the annoyance of the chairman, who called it "an affront to the committee, to the Congress and to American people."

Augustus F. Hawkins, chairman of the House Education and Labor Committee, said he had "personally issued an invitation" to Mr. Williams, assistant secretary for civil rights, to appear before the committee.

The California Democrat wanted him to clarify the department's controversial and confusing new policy that apparently restricts race-exclusive student scholarships.

The department confirmed his appearance Monday but called on Tuesday to say he would not be there, Mr. Hawkins said.

"It was his [Mr. Williams'] decision," said Etta Fielek, the Education Department's director of public affairs.

"He felt he had nothing else to add beyond what he said [in a news conference] yesterday," she said. "He made it clear in turning it down that when the new Congress comes in, if they want to talk about it, he's at their disposal."

The hearing went on without him. The higher-education lobby, the president of a historically black college and the National Association for the Advancement of Colored People Legal Defense Fund condemned Mr. Williams and the Bush administration for insensitivity to racial minorities.

Mr. Williams, who is black, has been the center of a firestorm since Dec. 4, when he wrote to Fiesta Bowl officials warning that their plans to give $100,000 to the participating schools solely for minority scholarships could run afoul of the 1964 Civil Rights Act. The law prohibits discrimination on the basis of race.

On Dec. 12, he announced his Office for Civil Rights' new enforcement strategy, which stirred an uproar. The strategy was aimed, among other things, at ensuring that colleges receiving federal funds do not discriminate against other races by awarding minority scholarships solely on the basis of race.

The White House, caught by surprise when the higher-education lobby and civil rights groups reacted with anger, retooled Mr. Williams' policy. On Tuesday he retreated from his position that the race-exclusive scholarships were illegal.

The flip-flop opened the door for Arizona's Fiesta Bowl football game to give money to the University of Alabama and University of Louisville for minority scholarships because the new policy allows colleges to use funds from private donors solely for minorities.

A senior Bush administration official said about 15 percent of the money that now goes to minority-targeted scholarships is private, 40 percent is state money and the rest comes from federal sources, either directly or indirectly.

Educators and lawmakers say the revised policy has increased the confusion about what colleges may do regarding minority scholarships. They say it prohibits private colleges from using their own funds, including endowment funds, for race-exclusive scholarships.

It generally prohibits race-exclusive scholarships paid for by state and local governments but OKs congressionally mandated scholarships for minorities.

It gives schools four years to review their programs under Title VI. During that time, the Office of Civil Rights will investigate complaints but will not make a broad review of school compliance.

"I think the policies are misguided efforts to turn back the clock on equality," said Mr. Hawkins, who at age 83 did not seek re-election.

The committee will submit its questions to Mr. Williams in writing and also ask him to explain, in writing, why he changed his mind about testifying, Mr. Hawkins said.

The Washington Times
THURSDAY, DECEMBER 20, 1990 / PAGE A3

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The Washington Post Thursday, December 20, 1990 A23

Michael Kinsley

None So Colorblind . . .

What civil rights principle does George Bush think he is enforcing?

The Henry Harrison Sprague Scholarship at Harvard College is for those "in whole or in large part of New England colonial descent." The Reuben Baker Scholarship is for "a resident of Latrobe, Penn., or, there being no such resident, a resident of the western part of Pennsylvania." The Helen E. Millington Memorial Scholarship is for "students whose fathers are deceased and whose mothers have not remarried." The list goes on for 350 pages.

The point is not that it still sometimes helps to be white. (Harvard, in practice, guarantees financial aid to all comers.) The point is that fate spews out all sorts of arbitrary advantages. Yet some people in government seem obsessed with one tiny category: the occasional advantage that comes from being black. Many who opposed the Civil Rights Act of 1964 in 1964, including Ronald Reagan and George Bush, now posture as guardians at the portals of its "true meaning." Who among these "reverse discrimination" obsessives believes that when all the advantages and disadvantages in the game of life are weighed and balanced, the advantage—even in 1991—goes to people of color?

Three years ago Reagan vetoed a bill authorizing broad federal civil rights enforcement at universities that accept federal funds. Congress overrode Reagan's veto. The Bush administration now tries to use this very law to restrict minority-targeted scholarships. Conservatives who condemned the bill as an unwarranted government intrusion into the private sphere seem to have forgotten their objection.

Bush is obviously sorry he stumbled into this thicket. He says the original decision to ban minority scholarships "was made without the knowledge of the White House." But he cannot blame a rogue assistant secretary of education for his sorrows. Michael Williams's ruling was the logical extension of everything Bush professes to believe about civil rights, in particular the principle that it must be "colorblind."

By contrast there is no coherent principle or logic in the policy the administration has settled on after a few mad days of backtracking. That policy holds that universities may not finance minority scholarships themselves, but may have minority-targeted scholarships financed by others.

Well, it's a distinction (as my old law professor used to say). But it hardly solves the moral puzzle of reverse discrimination. Bush says, "I've long been committed" to privately funded minority scholarships, as indeed he has. Yet how can scholarships based on race be morally repugnant when financed by universities but praiseworthy when financed by individuals?

Furthermore, the policy is not racially neutral, unless the administration is prepared to allow—if not encourage—whites-only scholarships at universities, provided they are financed by outsiders. I can't believe it is.

Even before the official backtrack, the policy was full of contradictions and violations of the alleged principle at stake. There is an exception for minority scholarships funded by the federal government itself. So, according to the Bush principles, it is the proper role of the federal government to 1) pay for minority scholarships itself, 2) ban minority scholarships paid for by universities and 3) encourage minority scholarships paid for by private individuals. Go figure. The revised version declares that the administration takes no position on minority scholarships funded by state and local governments. Probably a good thing.

Similarly, there is an exception for universities acting under a "court order to desegregate." Courts have used minority scholarships as a remedy in civil rights cases. And that's okay, apparently. Thus, according to the Bush interpretation, the same civil rights principles sometimes require you to create minority scholarships and sometimes forbid you to do the exact same thing.

The administration suggests that minority scholarships may be okay even without a court order to make up for past discrimination or simply to promote diversity. This is called reinventing the wheel. Universities don't create minority scholarships because they hate white people. They do it to promote diversity and make up for past discrimination. If those are good enough reasons to overcome the anathema on reverse discrimination, then the principle is an empty debating point.

Finally, according to the administration, there is nothing wrong with using race as "a factor" in awarding scholarships as long as it is not the "overriding" factor. This bit of sophistry derives from Justice Lewis Powell's opinion in the 1978 *Bakke* case. Yet a "factor" is only relevant if it is sometimes the determining factor. What is the moral difference between, say, reserving a tenth of your scholarships for blacks and using blackness as a "factor" that will make the difference 10 percent of the time? And this exception also is not "colorblind." The administration surely does not approve of using white skin as "a factor" in awarding scholarships. I hope.

So what's the moral? The moral, to me, is that in applying the principles of civil rights, there is no truly "colorblind" standard that any reasonable person, including George Bush, would actually be willing to enforce. It is possible to stir up white resentment against reverse discrimination. It is possible to recognize that reverse discrimination is dangerous medicine that should be used sparingly. It is not possible to get all self-righteous about "colorblindness" as an absolute principle and really mean it.

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NY Times (12/20/90)

White House in Disarray

Mishandling of Scholarships for Minorities Reflects Struggle for a Civil Rights Agenda

By ANDREW ROSENTHAL

Special to The New York Times

WASHINGTON, Dec. 19 — The White House's tortured handling of scholarships for minorities reflects both the disarray in President Bush's domestic policy management and a fierce struggle for the civil rights agenda in the top levels of the Administration.

News Analysis

That struggle resumed with a new intensity from the moment Mr. Bush woke up on the morning of Dec. 12 to news reports of the Education Department's decision to ban federally subsidized institutions from designating scholarships for specific minority groups.

Surprised and reportedly disturbed, the President ordered his chief of staff, John H. Sununu, to find a way to retreat from the ruling, which was not only politically damaging but also challenged Mr. Bush's commitment to minority scholarship programs.

Trying to Please Both Sides

Panicked White House officials clashed over policy and tactics in a series of contentious meetings that concluded, as has happened so often in Mr. Bush's tenure, with the White House trying to please both sides and, in the view of critics and supporters alike, pleasing virtually nobody, including the President himself.

Mr. Bush expressed concern that there would be a court challenge of the new ruling, which allowed use of private money specifically designated for minorities, but not money from a college's general operating funds. And some Administration officials worried that the split-the-difference approach would not only undercut the President's position opposing racial quotas, but would also leave the White House grappling for months with an issue that should have been laid to rest.

Under the revised proposal announced Tuesday by Michael L. Williams, the Assistant Secretary of Education for civil rights, there will be a four-year transition period during which "the Administration will not pursue a broad compliance review," thereby giving the Administration some leeway.

A Lack of Direction

"It's the central impulse of the Bush Administration — why can't everyone be satisfied?" said an adviser to the White House, who spoke on condition of anonymity.

Administration officials and Republican strategists said the fact that no senior White House official knew the change in policy was even being contemplated reflected a lack of direction and a lack of an "ideological compass" on domestic issues.

"If it were a different kind of Administration you could argue that someone would have known about the shift or that Bush's policy would have been so clear that Williams wouldn't have done it in the first place," one official said.

He added: "If it were a different kind of Administration, it wouldn't have been so hard to react. People didn't immediately fall into their grooves and say, 'This is what we have to do,' be-

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THE NEW YORK TIMES NATIONAL THURSDAY, DECEMBER 20, 1990

White House Disarray On Civil Rights Issues

Continued From Page A1

cause people don't necessarily know where their grooves are."

Stuart E. Eizenstat, who was President Jimmy Carter's domestic policy adviser, said the scholarships issue was part of a much broader problem.

"Bush has had to make common cause on issues from the budget to clean air and civil rights with a majority of Democrats in Congress who are to his left," Mr. Eizenstat said. "He is postured within his own party in the middle, while the interest groups, the outside advocates and the Young Turks on the Hill who are the most vocal are to his right. So you get constant tension and pressure, and the domestic policy of the Administration is Janus-like."

But the uproar over the scholarship issue was a case study more specifically in why it is so difficult for the Bush Administration to deal with civil rights issues as it tries to mollify conservative Republicans, woo Democrats who once voted for Ronald Reagan and mend fences with minority groups, all at the same time.

In part this is a reflection of one of the most fundamental battles in Republican politics — between movement conservatives who oppose all forms of racial quotas and establishment, government-oriented Republicans like Mr. Bush who operate largely according to pragmatism and support affirmative action.

Another Political Dimension

There is another political dimension. Some officials, like C. Boyden Gray, the counsel to the President, and William Kristol, Vice President Dan Quayle's chief of staff, see the issue of job quotas in the workplace as a strictly legal and ideological issue and as a golden opportunity to appeal to Reagan Democrats. They have been working to capture that issue for the 1992 elections, but have had to proceed slowly to avoid alienating black voters entirely.

Trying to please both sides, Bush pleases virtually nobody.

Other officials, including Jack F. Kemp, the Secretary of Housing and Urban Development, Roger P. Porter, the White House domestic policy adviser, and his aide, James Pinkerton, have been pressing for the Administration to be more open to minorities and to espouse affirmative action and other carefully modulated civil rights as a way of overcoming the Republicans' traditional problems with minority voters.

"The Education Department thing threw the cat among the pigeons, forcing a confrontation between these two desires," said Stuart Butler, director of domestic policy studies for the Heritage Foundation, a conservative, Washington-based research group. "They were trying to make a case for a civil rights policy that requires moving slowly and methodically, and the last thing you want is something that forces you to take sides."

Mr. Eizenstat said: "Bush and the Republican Party are torn. There are his own predilections to be fair and accomodating, and the political imperative to chip away the last remaining loyal bloc of Democratic voters, minorities. But there is also a need to give the Reagan Democrats red meat at a time when the economy is going into the tank, and they see civil rights and quotas as a wedge issue."

Ambivalence on Civil Rights

For months, the first group seemed to be winning this battle for Mr. Bush's soul, including an equally highly wrought fight over whether the President should veto the Civil Rights Act of 1990 in October. In that case, Mr. Bush came down on the side of those who argued that the bill would create job quotas, and he vetoed the bill.

But the ban on the practice of designating scholarships for minority students thoroughly confused the picture, since it struck at the President's own ambivalence on civil rights.

The pragmatic Republican in Mr. Bush was able to embrace the purist, no-quotas position despite the political hazards of vetoing the civil rights legislation. The scholarship issue touched the noblesse oblige side of Mr. Bush, who has long supported affirmative action and has contributed to causes like the United Negro College Fund.

"It's one thing to tell blue-collar workers you're protecting their jobs against racial quotas," said a Republican strategist. "It's quite another to take a college scholarship away from an 18-year-old black kid."

Some Republicans said they worried that the new position on scholarships would undermine the foundation of Mr. Bush's stand on the civil rights bill — that special treatment for any minority group, black or white, Hispanic or Asian, is not acceptable even if it is intended to help an underclass.

"Bush was on the record with that position on the Hill and it was something that Republicans and conservative Democrats could use to explain why they supported Bush's veto," said a Republican strategist. "Now all of a sudden, here comes Bush saying it is O.K. to treat some groups differently."

Safety Board Is Urging Redesign of Seat Belts

WASHINGTON, Dec. 19 (AP) — The National Transportation Safety Board urged the automobile industry today to redesign seat belts so they could be easily used by children, short adults and the elderly.

In a letter to 33 American and foreign auto makers, the board said the change would increase seat-belt use and promote safety. It hopes to persuade the industry to install an adjustable upper anchor for the shoulder-strap section of seat belts in all new cars.

European auto makers generally offer adjustable upper anchors, but the system is not readily available in the United States, the board said. The board has included the proposed change on a "most wanted" list of safety recommendations.

The letter warned that serious accident injuries were sometimes caused by improper seat-belt use because of an inability to adjust belts to the occupant's size. Among the most common mistakes, especially in seating children, is to place the shoulder section behind a child's back. Another is when the shoulder portion is placed under the arm, a practice that can have fatal results.

NEW YORK, THURSDAY, DECEMBER 20, 1990

COLLEGES EXPRESS GREAT CONFUSION ON MINORITY AID

AMBIGUITIES IN NEW RULE

Much of Uncertainty Centers on When Enforcement of the Policy Would Start

By ANTHONY DePALMA

After a week of efforts by the Education Department to explain its policy on college scholarships designated exclusively for minority students, college officials said yesterday that they were more confused than ever and that they did not intend to change their procedures until the department clarifies its intentions.

A printed statement issued by the department on Tuesday, as well as comments by department officials, were ambiguous on many main points. And the department's Assistant Secretary for Civil Rights, Michael L. Williams, failed to appear before a Congressional hearing yesterday to elaborate.

On Tuesday, Mr. Williams announced that colleges receiving Federal aid could award scholarships exclusively for minority students as long as the money came from private donations designated for that purpose or from Federal programs set up to aid minority students. But colleges would not be allowed to use money from their general operating budgets, which currently serve as the sources of much of the money for minority scholarships.

Last week Mr. Williams announced that colleges and universities that receive Federal money could not legally grant scholarships based solely on race.

Timing Is Uncertain

Part of the confusion yesterday centered on when the Bush Administration intended to begin enforcing its policy. Mr. Williams, in a policy declaration that The New York Times inadvertently omitted from coverage of his news conference, said Tuesday that there would be a four-year transition period during which "the Administration will not pursue a broad compliance review."

He said the purpose of the transition period was to give colleges time to review their scholarship programs and "to insure that any students under scholarship, or being evaluated for scholarship, do not suffer."

But at the same time, Mr. Williams said that during the transition period the Administration would "fulfill its statutory obligation to investigate any complaints received." It was not clear if such investigations might result in decisions directly affecting individual minority students. Mr. Williams's office is currently investigating one complaint, brought by a white student at Florida Atlantic University, in Boca Raton, who said he lost out on a scholarship because of his race.

Education Department officials said yesterday that various aspects of the new policy remained unclear to them. Among these are whether students entering college after fall 1991 would be eligible for minority-based scholarships from a college's general funds.

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Colleges Remain Baffled by Scholarship Policy

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whether the same policy would be applied to scholarships specifically set aside for women, the handicapped or older students; and why a distinction can be legally made between money donated by a private person and nongovernmental money awarded by a private university from its general operating budget.

Yesterday, some college officials questioned whether the announced changes have the force of law.

On Capitol Hill, Representative Augustus F. Hawkins, the California Democrat who is chairman of the House Education and Labor Committee, called Mr. Williams's failure to testify yesterday "an affront to the committee, the Congress and the American people." He characterized Mr. Williams's ruling as a "misguided effort to turn back the clock on equality."

Setting a theme that was echoed by witnesses at the hearing, Mr. Hawkins criticized the Administration's policy-making acumen. "Lurching from policy by press release to policy by press confrerence, the Department of Education and, indeed, the Administration itself has demonstrated a disdain for the orderly process of government," he said.

A spokeswoman for the Education Department said Mr. Williams did not testify because he needed more time to prepare.

Many higher-education officials said they did not intend to change any current practices until the issues were clarified.

"We sent out an advisory to all our colleges to ignore the department's opinion until we have a lot more information," said Dale Parnell, president of the American Association of Community and Junior Colleges. "The whole thing is so fuzzed up that we're probably going to need a court decision to clear it."

In large part the confusion in Washington and on campuses across the country is caused by the way the Education Department made known the new policy, which bans many scholarships designated exclusively for minority students.

Last week the department made the blanket ruling that colleges and universities receiving Federal money could not give out minority-only scholarships because they were discriminatory.

On Tuesday, it backed off that stand, which had caused an uproar of adverse public opinion. It said colleges could award scholarships on the basis of race if the money came from private contributions earmarked for that purpose. For example, private philanthropies, like the Richard King Mellon Foundation, often provide education assistance specifically for minority students.

The Education Department continued to allow minority-only scholarships that are mandated by Congress and scholarships financed by state and local governments, saying they are protected by court decisions.

What the new regulations restricted is scholarships that colleges and universities give using their own money. Such money includes tuition receipts that go into their general treasury or money from private donors that is not earmarked for any specific purpose. That money has routinely been used to provide scholarships that are awarded exclusively to minority students as a way to increase enrollments in certain areas. It is also used to finance other types of scholarships.

Attempts to clarify lead to more confusion.

The partial reversal of the department's original decision, intended to ease political criticism, appeared to appease almost no one.

Robert H. Atwell, president of the American Council on Education, which represents 18,000 colleges and universities, said the situation was "only made worse by this clarification."

It is not clear how many race-exclusive scholarships exist. Some private colleges do not use any of their own money to give scholarships based on race. A 1988 report by the National Center for Education Statistics indicated that 63 percent of black undergraduates nationwide received financial aid of some kind, but that only 13.9 percent were helped by money that came from the colleges or universities themselves. There is no way of knowing whether the help was granted solely on the basis of race or in conjunction with financial need and other factors.

The Education Department has not sent college administrators any official notification of the new regulations, which leaves the college officials trying to determine from news reports and press releases what they will be forced to do to meet the new standards.

A spokeswoman for the department, Etta Fielek, said letters explaining the new policy could be mailed to college administrators in a few weeks. All that the department has asked institutions to do for now, she said, is review their own programs.

Ms. Fielek said that during the four-year transition period the department would investigate any complaints filed about discriminatory scholarships but that it would not conduct any broad review to see whether colleges were complying with the regulations.

As part of the new policy, the Administration wouldill encourage state legislatures and local governments to review the legal restrictions on minority scholarships.

If the regulations are enforced in four years, the critical factor for institutions will be figuring the steps by which privately donated money can be designated so that it can be set aside for minority scholarships.

Tim Christensen, associate director of the National Association of Student Financial Aid Administrators said one legal question is whether donors who wish to designate money for a special group must administer the program themselves in order to prove that the money is indeed separate from the university's general treasury.

Daniel Steiner, vice president and general counsel at Harvard University, said he thought that designating donations for minority scholarships would be as simple as inserting a clause in the letters transmitting the scholarship money to the institution.

Mr. Atwell said the new ruling would invite a surge of lawsuits against institutions and complaints to the Office of Civil Rights. He said it "raised a host of questions about whether the same arguments applied to minority scholarships will be extended to scholarships restricted by gender, national origin, religious affiliation or handicapped status."

An indication of how broadly the new ruling can be interpreted came from Senator Bob Dole, Republican of Kansas, who urged the Education Department to re-examine admission preferences that private colleges and universities give to children of alumni.

THE NEW YORK TIMES, THURSDAY, DECEMBER 20, 1990

Scholarship Policy Called Not Binding

Revision Is 'Personal Opinion' That Lacks Force, Ex-Official Asserts

By Kenneth J. Cooper
Washington Post Staff Writer

A former head of the Education Department's civil rights office told Congress yesterday that the department's revised policy on minority scholarships is not legally binding on colleges because it has not been stated in formal regulations or upheld by an administrative law judge.

The scholarship restrictions announced Tuesday by Michael L. Williams, assistant secretary for civil rights, represent his "personal opinion," said David S. Tatel, who had the same job during the Carter administration.

Tatel, now a Washington lawyer, was one of a series of witnesses who criticized the department at House Education and Labor Committee hearings. Williams canceled a planned appearance before the panel.

On Tuesday Williams modified a near-ban on "race-exclusive" scholarships that he had announced last week, and said colleges can make such grants out of private funds earmarked for that purpose. But he also said private colleges could not use their own funds for such scholarships and that public colleges could not devote public funds to them. Williams announced a four-year "transition period" to allow time for colleges to adjust their scholarship programs and for students with race-based grants to complete degree programs. He also said his office will continue to investigate any complaints about race-based scholarships.

Yesterday a department spokesman said Williams "would be bound" to take enforcement action if an investigation found a college's scholarship program was racially discriminatory under the Civil Rights Act of 1964.

In his testimony, Tatel said Williams's "recent announcements do not bind recipients of federal funds. The fact is that the assistant secretary has absolutely no authority to bind any recipient of federal funds simply by issuing a press release."

Because Williams has not initiated "formal regulatory procedures" or an enforcement action upheld by an administrative law judge, Tatel said his six-point policy on scholarships "should be viewed as no more than his own personal opinion" or "law enforcement strategy." He later told reporters that colleges "don't have to go out and abolish their minority scholarship programs," but he did advise colleges to conduct legal reviews of them.

A department spokesman said Williams disagrees with Tatel and believes the scholarship policy to be legally binding without new regulations. "As far as his reading of existing law, no further action would be neccessary to enforce that law," the spokesman said.

The College Board yesterday released the first nationwide figures that suggest how many colleges provide scholarships based at least in part on a student's race.

At least 785 colleges offer such scholarships, according to responses to the board's 1990 survey of 3,138 accredited colleges. Joan Marsone, the board's director of information services, said 453 public colleges and 332 private colleges reported that "minority status" was a criterion for some scholarships. The survey did not gather similar information on white ethnic groups and did not ask about the number or value of minority scholarships.

Rep. Augustus F. Hawkins (D-Calif.), the committee's outgoing chairman, criticized Williams for not testifying after confirming Monday that he would appear. The cancellation, Hawkins said, was "an affront" to the committee.

A department spokesman said Williams decided not to testify because he wanted time to study legal cases and other material concerning the new scholarship policy.

William Raspberry

Scholarships and Politics

It was, I suppose, the gratuitousness of the thing that hit me. Had there been some allegation that race-specific scholarships are keeping deserving white students out of college; had there been some evidence that black or Hispanic students are overrunning our university campuses; had there been a contention that the government was somehow promoting racial unfairness, then the newest edict out of the Department of Education might have been less jarring.

But Michael L. Williams' decree that colleges receiving federal aid may no longer offer scholarships on the basis of race came out of the blue, in answer to a question that no one seemed to be asking. It makes you wonder what mind set—or what political consideration—prompted the ruling. Williams, assistant secretary for civil rights and one of the administration's favorite black conservatives, offered an easy explanation. "We're just law-enforcement folks," he said, citing the Civil Rights Act of 1964, which forbids discrimination on the basis of race, religion or national origin.

But when the law-enforcement folk, absent any complaint or any interest in your rights, start enforcing novel interpretations of the law against you, it's not unreasonable to wonder what's going on.

America's racial problem is not that black people have too much opportunity, but that they have too little. And the Reagan-Bush people have shown little interest in addressing that problem. Instead, they not only have adopted the attitude that disparate racial outcomes are no business of the government but also moved—again gratuitously—to dismantle efforts to overcome the difference. It was the Reagan administration that sought, without any urging on the part of the affected jurisdictions, to overturn consent decrees aimed at increasing the number of black firefighters and police officers. It was Bush who vetoed the Civil Rights Act of 1990, designed to overturn several Supreme Court rulings that made it more difficult for minorities and women to bring discrimination suits.

In each case, the rationale was color-blind fairness. In each case, the effect was to protect the rights of white men. Do these fair-minded conservatives believe, with Jesse Helms and David Duke, that white men are this country's principal victims of discrimination?

What is so curious about the Department of Education ruling, which coincides with widespread worry over declines in black college attendance, particularly among black men, is that it has nothing to do with federal student aid. Instead, it forbids colleges and universities to use their own or other private resources for scholarships to increase the number of blacks on their campuses. The bitter irony is that the authority for Williams' ruling comes from a 1988 law—enacted over a Reagan veto—that allows the federal government to bar discrimination in any school that receives federal funds.

Even so, the ruling is more insensitive—and politically symbolic—than wrong. Williams' decree still would permit race as a consideration in awarding scholarships so long as race is not the only factor. In other words, whites must at least have a chance at the awards.

That doesn't particularly trouble me. It has long seemed to me that it makes more sense to give special consideration, whether for scholarships or admission, to those whose opportunity has been demonstrably restricted by economic or social factors. Help based on economic need, for instance, might still go disproportionately to blacks or Hispanics without removing from consideration the child of a poverty-stricken white family.

Making race the sole criterion introduces another aspect of unfairness. It takes children from well-off black families out of competition with their white peers and puts them in competition with members of the black underclass.

But those objections would be a good deal easier to swallow if they came from an administration that had demonstrated some concern for the special and continuing disadvantage of being black in America. As it is, the suspicion is that the whole business is, like Helms's dastardly TV ad or Bush's Willie Horton play, calculated to appeal to anti-black conservatives.

It may help Republicans win a few elections, but it could wind up costing them something more precious: their moral right to govern.

Grants based on race OK by Kemp

By Carol Innerst
and Carleton R. Bryant
THE WASHINGTON TIMES

[redacted]

Housing and Urban Affairs Secretary Jack Kemp says he disagrees with the Education Department policy of barring federally funded colleges from offering scholarships based solely on race.

"I believe we should give financial assistance — affirmative efforts, if you will — to broaden opportunity for higher education based both on minority, as well as income," Mr. Kemp said on CBS-TV's "Face the Nation" yesterday.

Mr Kemp, a leading conservative, is the first member of President Bush's Cabinet to criticize the ruling by Michael L. Williams, assistant secretary for civil rights in the Education Department.

The White House and the Education and Justice departments are reviewing the policy, said Etta Fielek, director of public affairs at the Education Department. "There's no particular timetable, but there's no interest on the part of anyone to have it drag on."

The issue has produced a schism in the White House staff and Cabinet. Like Mr Kemp, Health and Human Services Secretary Louis Sullivan was upset by the policy. Budget Chief Richard Darman and William Kristol, Vice President Dan Quayle's chief of staff, argued that Mr. Williams' position is consistent with the president's veto of a civil rights bill that he saw as establishing quotas.

[redacted]

According to Ms. Fielek, then-Education Secretary Lauro Cavazos supported the ruling. The decision was only one of several issues the department intends to address, she said, adding that the rest "got kind of lost in the rhetoric" surrounding the issue of minority-specific scholarships.

Mr Cavazos was ousted by White House Chief of Staff John Sununu. His resignation, submitted Wednesday to Mr Bush, became effective Saturday.

Ms. Fielek and Mr Williams listed priorities for civil rights enforcement, including the department's plan to bar colleges from awarding scholarships based solely on the recipient's race.

The furor raised by Mr Williams' ruling is "an overreaction" to the Education Department's announcement offering technical assistance to Fiesta Bowl officials, who plan to give $100,000 to each team playing in the bowl on New Year's Day, she said. The scholarships were to be used by the universities of Louisville and Alabama to award scholarships to minority applicants.

CIVIL RIGHTS PRIORITIES

[illegible] and the areas it will try to [illegible]

1. Less-than-equal educational opportunities for students with limited English proficiency.
2. Ability grouping that results in segregation on the basis of race or national origin.
3. Racial harassment on school campuses.
4. Denial of equal educational opportunities for pregnant students.
5. Discrimination on the basis of sex in athletic programs.
6. Discrimination on the basis of race in the admission of students to undergraduate and graduate schools.
7. Misidentification of "crack babies" and homeless children with handicaps.

The Washington Times

[redacted]

Ms. Fielek said Mr Williams reminded the Fiesta Bowl officials that civil rights laws prohibit race-exclusive scholarships in most cases. In a letter to the officials, he suggested that the proposed Martin Luther King Jr scholarship fund be changed from a "race-exclusive program to a program in which race is considered a positive factor among similarly qualified individuals, or to a program that utilizes race-neutral criteria," she said.

"Michael was worried because a desegregation study on [the state of] Kentucky is working its way up through the system," she added. "And he wanted to keep all issues on an even keel. His offer of technical assistance took on a life of its own."

"Race can be one of many factors considered, but not the sole factor," Ms. Fielek said about federally backed scholarship programs. "When talking about scholarships administered by schools, it's a whole different set of issues than scholarships from private trusts or foundations."

During his interview yesterday, the housing secretary described the outcry over the ruling as a "zero-sum approach to politics," a game in which one wins only when another loses.

"We can't have a country in which we split black from white or have two parties — one is black and one is white," Mr Kemp said. "What we want is a country in which we're not having a zero-sum economy or opportunity society. We want opportunity for both white and black."

The House Education and Labor Committee is scheduled to open hearings Wednesday on the controversial decision, the committee's ranking Republican said yesterday.

"He's not holding hearings to determine if the policy is good or bad," said Rep. William F. Goodling of Pennsylvania. "The chairman is holding hearings at the request of the educational institutions" to clarify the policy.

Rep. William D. Ford, Michigan Democrat, is the incoming chairman of the education committee.

Education lobbyists, civil rights groups and others are expected to attack the new policy.

"There's been an extremely sharp reaction," said Reggie Govan, the committee's counsel for civil rights and labor standards. "The focus will be on a policy that has been in place over the last decade and the process of the department in changing that policy."

• *This article is based in part on wire service reports.*

Colleges Offer Data To Assess Scholarship Policy's Impact

By Mark Pitsch

In the weeks since Assistant Secretary of Education Michael L. Williams made his controversial statements on the legal status of minority scholarships, college officials have sought to give a clearer picture of the number and nature of those awards.

Among the data cited:

- According to the College Board's annual survey of colleges and universities, 24 percent, or 696, of the responding institutions for the 1990-91 academic year reported distributing grants or scholarships to minority students without regard to financial need. That was up from 15 percent, or 439, of the schools responding in 1987-88.

About 27 percent, or 785 schools, reported issuing grants or scholarships to minorities based on both race and need in 1990-91, the survey found. That was up from 16 percent, or 467, of the schools in 1987-88.

- At least nine states have established scholarship, grant, or loan-forgiveness programs for minorities regardless of need, according to a 1989-90 survey by the National Association of State Scholarship and Grant Programs.

In addition, it found, six states have minority scholarships and grants that take need into account.

- A 1990 survey of 142 public, four-year institutions in 10 states with large minority populations, conducted by Richard C. Richardson, professor of educational leadership and policy studies at Arizona State University, found that more than 60 percent of the schools offered special entitlements to minority students.

While Mr. Williams did not specifically address loan-forgiveness programs, some educators have voiced concern that state programs that waive college-loan repayments for minority students who enter teaching might be deemed illegal.

At least 10 states have such programs, according to a survey by the American Association of Colleges for Teacher Education.

The position laid out by Mr. Williams on Dec. 18 states that colleges, with some exceptions, may award race-exclusive scholarships only if they are financed with private money donated specifically for that purpose.

If the policy stands, observers predicted, expensive private colleges and the most selective public universities will be hardest hit, because they commonly have to offer sizable financial incentives to attract minority students.

Richard F. Rosser, president of the National Association of Independent Colleges and Universities, told the House Education and Labor Committee last month that 70 percent of the financial aid targeted for minority recruitment and retention at many schools comes from general institutional funds, and therefore would be illegal under the department's position.

Loss of 'Welcome Mat'?

College and university officials have also expressed uncertainty over how broadly the department might apply its legal interpretation.

Blenda J. Wilson, chancellor of the University of Michigan-Dearborn, said she worried that the college-access program at her school, which includes tutoring, mentoring, and scholarships for disadvantaged students who live in Detroit neighborhoods, could be affected. The neighborhoods targeted are 75 percent black.

"If the federal government can tell higher-education institutions that they can't give minority scholarships, they might begin to say you can't discriminate by neighborhood," she said.

James E. Lyons, president of Bowie State College in Maryland, said he wondered if the "other-race grants" distributed by the state to encourage whites to attend his predominantly black school will be affected.

Apart from the potential monetary impact, many educators warned, the scholarship flap could send a negative message to minority students.

Those students see scholarships designed for them as a "welcome mat" of sorts to the predominantly white institutions of higher education, the educators said. The department's position, they argued, pulls that mat from under them just as demographic trends are making minorities an increasingly critical source of skills for the job market.

"There may be some basis in the law for this [position] that I don't know about, but in my opinion there is no basis in educational or social judgment," said Gordon H. Lamb, president of Northeastern Illinois University, which has aided nearly 50 minority students with $1,000 scholarships it developed with the private sector.

EDUCATION WEEK

American Education's Newspaper of Record · Volume X, Number 16 · January 9, 1991 · © 1991 Editorial Projects in Education | $2.50

Assistant Secretary Michael L. Williams has not spoken publicly on the issue of race-exclusive scholarships since Dec. 18.

A Month Later, Educators Are Still Seeking Final Word on Race-Exclusive Scholarships

By Mark Pitsch

WASHINGTON—A month after the Education Department touched off a national firestorm with a move to curtail race-exclusive scholarships, education representatives here are still looking for clarification—or reversal—of the Administration's policy.

Michael L. Williams, the department's assistant secretary for civil rights, has not spoken publicly on the issue since a Dec. 18 news conference at which he modified an earlier statement that such scholarships, with certain exceptions, violate Title VI of the Civil Rights Act of 1964.

Mr. Williams was to be on leave until this week, and other department officials are refusing to comment on the issue, according to a department spokesman.

But the issue was a prime topic last week in conversations between Lamar Alexander, President Bush's nominee as Secretary of Education, and leading members of the Senate Labor and Human Resources Committee, according to Senate aides.

Mr. Alexander did not express an opinion on the matter, the aides said, but is certain to be pressed for his views when the committee holds hearings on his nomination.

Senator Paul Simon, a panel member, postponed plans to hold hearings this week on the scholarship controversy to allow Mr. Alexander more time to formulate a posi-

Continued on Page 26

Groups Seek Final Word on Race-Exclusive Scholarships

Continued from Page 1

tion, aides to the Illinois Democrat said.

Under the modified policy enunciated by Mr. Williams, colleges may administer race-exclusive scholarships as long as the awards are financed with private funds earmarked for that purpose, or are established under a court order.

Members of the Congress have vowed to draft legislation that would reverse the policy, either separately or as part of the reauthorization of the Higher Education Act later this year.

College officials, meanwhile, appear to be taking a wait-and-see attitude, with many vigorously defending minority-scholarship programs and pledging to continue them.

James E. Bolton, who handles minority affairs for the president of the University of Wisconsin system, said the 137,000-student system would unconditionally "continue to administer our undergraduate retention grant, our freshman grant, our minority teacher forgivable-loan program, and our graduate, professional, and doctoral program."

He said the system annually administers some $3.2 million in minority grants and scholarships.

College and university officials see Mr. Williams "as a flash in the pan," Mr. Bolton said.

Nearly 700 colleges responding to a recent survey said they awarded grants or scholarships to minority students regardless of financial need. (*See related story on this page.*)

Letter to Fiesta Bowl

The furor over the Administration's policy began with a Dec. 3 letter from Mr. Williams to the executive director of the Fiesta Bowl about the bowl's plans to give $100,000 each to the University of Alabama and the University of Louisville, the schools playing in the annual football contest, for the establishment of minority-scholarship funds.

In the unsolicited letter, Mr. Williams stated that the Education Department's office for civil rights "interprets [Title VI of the Civil Rights Act of 1964] as generally prohibiting race-exclusive scholarships."

He further stated that, while private entities could create scholarships limited to a particular race, colleges receiving federal funds could not assist in administering them. Schools could adopt such programs if they are under court order to desegregate, he added.

The letter brought expressions of outrage from civil-rights and education officials, who said Mr. Williams was unilaterally reversing long-established policy and threatening to destroy years of progress in opening college doors to minorities.

Mr. Williams said later that he had not expected the "political firestorm" that erupted from his move, which he called "politically naive." He said that before sending the letter he had consulted Secretary of Education Lauro F. Cavazos, the department's general counsel, and a number of lower-level White House officials.

President Bush, already under fire for his veto of the 1990 civil-rights bill and efforts by some Republicans to make affirmative-action programs a campaign issue, said he was "very disturbed" by the opinion and ordered it reconsidered.

In response to the criticism and reportedly at the behest of the White House, Mr. Williams outlined a revised, six-point approach to race-exclusive scholarships on Dec. 18.

He said colleges can administer privately funded scholarships for minorities, but cannot use their own funds or state funds for that purpose if they receive federal money.

Acknowledging that "the position that has been very clear to us has not been clear to the colleges and universities," Mr. Williams said schools would have a four-year grace period to ensure they comply with the new policy, and that he would investigate race-based scholarships only in response to specific complaints.

Mr. Williams also said that U.S. Supreme Court rulings in *Regents of the University of California v. Bakke*, which held minority-admissions quotas to the university's medical school to be unlawful, and *City of Richmond v. J.A. Croson Company*, which struck down government contract set-asides for minorities, forbid the distribution of race-exclusive scholarships funded by state and local governments.

Because of those decisions, he maintained, the O.C.R. "cannot [address] administratively" such scholarships—a view questioned by other legal experts, who note that the office is specifically charged with enforcing civil-rights statutes and Supreme Court decisions on civil rights.

Mr. Williams also defended his move away from his earlier position.

"I think our [original] decision was legally correct, but obviously there are different ways of looking at this," he said. "There are other legal theories, legal bases, that will still fit. And the positions we took fits those legal theories."

He also emphasized that race can be a legitimate factor in awarding scholarships as long as it is considered with other criteria, such as financial need.

Issue certain to surface during Alexander's confirmation hearings.

Legally Binding?

While a few civil-rights and education officials praised the Administration and Mr. Williams for reconsidering the department's position, most scrambled to understand the new interpretation or attacked it outright.

Many educators criticized Mr. Williams for "making policy by press release" and questioned whether the department's position was legally binding and would be upheld in court. They noted that the department did not rule on a complaint or publish regulations before arriving at its position.

David S. Tatel, a Washington lawyer who was the civil-rights chief for education under the Carter Administration, argued that Mr. Williams's statements did not bind the use of federal funds and amounted to nothing more than "personal opinion."

Janell M. Byrd, assistant counsel for the NAACP Legal Defense and Educational Fund, said the policy "seems to run head-long into the Civil Rights Restoration Act of 1988," which states that if an institution receives federal aid, the institution as a whole must not discriminate.

The law overturned a Supreme Court ruling, in *Grove City College v. Bell*, that held that anti-discrimination laws applied only to the specific program receiving federal funds.

"If it is somehow illegal or discriminatory for the university to fund minority-specific scholarships with its own funds, then it would seem to be illegal for them to administer them as well," Ms. Byrd said.

John Scully of the conservative Washington Legal Foundation praised Mr. Williams's original statement on the issue, and said he hoped that the second announcement would not amount to a reversal. "If they're going to enforce the law, I applaud that," he said. "If they're not going to, or ignore the law, I disagree."

Mr. Scully, who has filed a complaint with the O.C.R. against Florida Atlantic University and the University of Florida over their use of minority scholarships, said he has been contacted by a number of students willing to challenge race-exclusive scholarships at their schools.

Mr. Williams said five complaints over minority scholarships are pending with the O.C.R.

While critics said Mr. Williams's statements diverged sharply from long-standing policy, the assistant secretary maintained that he was attempting to clarify a department position that over the past decade had been on both sides of the issue.

Among the circumstances cited by the department:

- In March 1982 and March 1983, department civil-rights officials ruled that race-exclusive scholarships as voluntary affirmative action were legal under the Civil Rights Act of 1964 and were consistent with the *Bakke* decision.

"Admissions quotas, the policy at issue in *Bakke*, unlike many other policies, may result in the exclusion of an individual from a university on the basis of race or national origin. The availability of a particular financial aid program does not have such a far-reaching effect," Burton M. Taylor, director of the division of postsecondary education for the O.C.R., wrote in 1982 to a complainant who challenged a minority-scholarship program at the Massachusetts Institute of Technology.

- In March 1988, an O.C.R. regional director told Dartmouth University officials that a race-exclusive scholarship program proposed by Procter & Gamble was legally questionable and should be redirected toward economically disadvantaged students.
- Fourteen months later, a different O.C.R. regional director said that black-only scholarships to David Lipscomb University in Nashville were legal because they were being used to redress past discrimination. White-only scholarships were illegal because whites had not been discriminated against, the official said.
- In 1986, an O.C.R. official said the office could not rule on the legality of a proposed minority-scholarship program at Southwest Missouri State University because the school was not under court order to desegregate and did not present evidence that it wanted to establish the scholarship to redress past discrimination.

Moves on Capitol Hill

Most higher-education groups say they are not sure what to tell their members about the policy's potential impact. It is unclear, for example, how and whether the policy might be applied to scholarships earmarked for children of alumni or students from certain geographical areas.

"The subtlety of the way these things are being played leaves open a great deal of legal questions and administrative questions," said Tim Christensen, associate director of the National Association of Financial Aid Administrators.

For now, most groups are advising schools to continue their current scholarship programs until the grace period expires or the policy is reversed—by the courts, the Congress, or the department itself.

Congressional moves to overturn the policy are already under way.

Senator Simon has directed his staff to draft legislation that would reverse the policy.

Representative F. James Sensenbrenner, Republican of Wisconsin, is considering similar legislation.

The House Education and Labor Committee held a hearing on the policy last month. Representative Kweisi Mfume, a Maryland Democrat, called on Mr. Williams to resign, and the panel's retiring chairman, Augustus F. Hawkins of California, said Mr. Williams's cancellation of plans to testify was "an affront to the committee, to the Congress, and to American people."

NATIONAL REPORT

President Bush answers questions from Black publishers and editors during a private White House luncheon in the Roosevelt Room.

Bush, Black Journalists Debate Scholarship Issue At White House Luncheon

President George Bush invited 12 top Black publishers and editors from across the country to a private White House luncheon for the second time in less than a year.

But before the guests could take their seats in the Roosevelt Room, President Bush confided that he was "embarrassed" by the Education Department's hullabaloo over minority scholarships.

Only days before the luncheon, Assistant Secretary of Education for Civil Rights, Michael L. Williams, who is Black, stirred a hornets nest among Black and White educators and civil rights advocates with his announcement that "race specific" scholarships were discriminatory. No issue has created such a turmoil, especially in an administration of a man who promised to become known as the education president. The luncheon had been scheduled before Williams' controversial announcement.

Bush told the journalistic audience that while he continues to question the fairness of quotas, he remains "committed to affirmative action." Additionally, he predicted, the constitutionality of race-exclusive scholarships inevitably will be decided later in the courts.

To the surprise of some guests, President Bush defended Williams, saying "he is not some sort of neo-racist" and despite his concerns pertaining to the ruling "nobody had to go the woodshed."

During a considerable part of the 1½ hour luncheon, President Bush fielded questions on the education issue as well as questions about his veto of the 1990 Civil Rights Act, the Persian Gulf crisis, and racism.

Citing recent incidents of racially motivated attacks by such groups as "skinheads" and the nearly-successful senatorial bid in Louisiana by David Dukes, President Bush said he hoped these examples were not an indication of increasing racism. Speaking out against racism is a "proper" function of the White House, he concluded, saying, "I have the obligation to say race has no place in this society."

Guests dined on tomato bouillon soup, sliced roast tenderloin of beef, wild rice, French green beans, and cheese cake.

Following the luncheon Bush escorted guests into the Oval Office for a brief look-see.

White House luncheon guests were listed as: William Garth, Chicago Citizen Newspaper; Paul Bennett, Philadelphia Tribune; Areyla Mitchell, The Tri-State Defender (Memphis); Thomas Watkins, The New York Daily Challenge; Marie Smith, Black Entertainment Television; Lerone Bennett, Executive Editor EBONY; Eric Simpson, The Florida Star; Robert McTyre, Michigan Chronicle; Connie Cameron, Seattle Medium; Kenneth Thomas, Los Angeles Sentinel; F. Cosmos Harris, Denver Weekly News; and Richette L. Haywood, Associate Editor JET. Also in attendance were White House officials Marlin Fitzwater, Robert Gates, Deb Amend, and Joseph Watkins.

Minority Scholarship Policy Change Draws Reactions

Educators and civil rights leaders are giving mixed reviews to President Bush's alteration of a controversial U.S. Department of Education policy banning racially-based college scholarships.

At a press conference announcing the new stance, White House Press Secretary Marlin Fitzwater said President Bush was "very disturbed about the ruling in the sense that he believes these scholarships are important to minorities and to ensuring opportunity for all Americans to get a good education." However, under the revision to the policy, colleges could award such scholarships as long as the money came from private donations for that purpose or from Federal programs set up to aid minorities. The money could not come from general funds, which is the source of most of the money private colleges use for scholarships, said Michael Williams, assistant Education Secretary, who articulated the original opinion.

Michael Williams

The Rev. Jesse Jackson says the new policy is just a continuation of a political game by the Bush administration. Rev. Jackson says Bush knew of the decision all along and Williams, who is Black, was used as the 'front man.'

Dr. Benjamin Hooks, executive director of the NAACP, said: "In

(Continued on page 11)

Jet Magazine (January 7, 1991)

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Newhouse Foundation Donates $2 Million To Private UNCF Schools

The United Negro College Fund has received a $2 million gift from the Samuel I. Newhouse Foundation for scholarships at seven colleges in Alabama and Louisiana, UNCF President Christopher F. Edley recently reported.

The Newhouse Scholarship Fund will finance scholarships at Miles College, Oakwood College, Stillman College, Talladega College and Tuskegee University in Alabama; and at Dillard and Xavier Universities in New Orleans.

"The importance of this gift," said Edley, "is that it is destined for some of the most deserving recipients – the bright young people who would not be able to attend these schools but for the generosity of the Newhouse Foundation and the Newhouse group of newspapers. This magnificent gift is the latest example of the long-term support from the Newhouse Foundation to UNCF and to our historically Black colleges and universities."

Donald E. Newhouse, who serves as vice President of the Newhouse Foundation, said, "The Newhouse Foundation is delighted to help meet the needs of the UNCF in this vital educational mission. Through this gift, the foundation recognizes the importance of giving young people the opportunity to further their education regardless of financial obstacles."

In the respective cities, the scholarships will be presented by the Birmingham News, The Huntsville Times and the Times-Picayune, all part of the Newhouse group of newspapers.

(Continued from page 5)

our view, the President has acted properly and in the national interest, in reversing the decision. The decision should not have been made in the first place, since what it has primarily accomplished has been setting off an ugly debate that in too many instances has attempted to project minority scholarships as something harmful to the interest of the majority groups."

The ruling in question stemmed from a decision by Williams after Fiesta Bowl officials offered to donate $100,000 for minority scholarships to schools who participated in the Arizona football game this year.

"The position taken by President Bush today does not represent a change of policy. It represents a change of politics and of public relations. In fact, policy-wise, President Bush is being inconsistent," Rev. Jackson said. "The letter put out by Mr. Williams is the logical conclusion of Mr. Bush's veto of the 1990 Civil Rights Restoration Act and his calling it a 'racial quota' bill. The Bush administration would like to do to the 'academic set-aside' program (in the courts) what it did to the 'economic set-aside' program in Richmond case – destroy it legally."

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Brunswick, GA	Thurs., January 24
Jekyll Island Convention Center	8:00 p.m.
Jacksonville, FL	Fri., January 25
Jacksonville Civic Auditorium	8:00 p.m.
West Palm Beach, FL	Sat., January 26
Municipal Auditorium	8:00 p.m.
Nassau, Bahamas	Tues., January 29
Britannia Towers Ballroom	8:00 p.m.
Freeport, Bahamas	Wed., January 30
Bahama Princess Country Club	8:00 p.m.
Ft. Lauderdale, FL	Thurs., January 31
Sunrise Musical Theatre	8:00 p.m.
Miami, FL	Thurs., February 1
James L. Knight Center	8:00 p.m.
Orlando, FL	Sat., February 2
Bob Carr Performing Arts Center	8:00 p.m.
Tampa, FL	Sun., February 3
Tampa Theater	5:00 p.m.
St. Petersburg, FL	Mon., February 4
Bayfront Mahaffey Theatre	8:00 p.m.
Melbourne, FL	Wed., February 6
Melbourne Auditorium	8:00 p.m.
Daytona Beach, FL	Thurs., February 7
Ocean Center at Daytona Beach	8:00 p.m.
Savannah, GA	Fri., February 8
Savannah Civic Center	8:00 p.m.
Columbia, SC	Sat., February 9
Township Auditorium	8:00 p.m.
Charleston, SC	Sun., February 10
Gaillard Municipal Auditorium	7:00 p.m.
Wilmington, NC	Tues., February 12
Kenan Auditorium/Univ of NC at Wilmington	8:00 p.m.

Michelle Zeno
Los Angeles, CA

Praising President George Bush's support of minority-only scholarships are (seated, l-r) Central State Univ. President Arthur Thomas, Carol Fleming, Leonard L. Haynes III, asst. secy. for postsecondary education, Howard Univ. President Emeritus James Cheek, Robert Goodwin, Edmond Gaither, Portia Scott, (standing, l-r) Milton Bins, Meharry Medical College President David Satcher, Albertine Turkam, Ruth Love, Carl Ware, John Carter, Patricia Williams, Caspa Harris, William Hytche, William Hogan, Alcorn State President Walter Washington and Bennett College President Gloria Scott.

Bush's Black College Bd. Lauds Call For Review Of Minority Scholarship Plan

A commission of Black educators praised President Bush for nullifying the recent Education Department interpretation of constitutional law banning minority-only scholarships.

Members of the President's Board of Advisors on Historically Black Colleges and Universities were in the nation's capital when Education Assistant Secretary Michael Williams made a public statement and later held a press conference contending that such scholarships earmarked for Black students were unlawful. Former Education Secretary Lauro Cavazos, only a few days earlier, had sworn in members of the board, who were appointed by the President, and the next day found himself ousted from the Cabinet.

During the turmoil, commission members suddenly had their backs to the wall in the effort to help Black students. However, President Bush's action in calling for a review of the policy before implementation gave the educators time to develop a strategy.

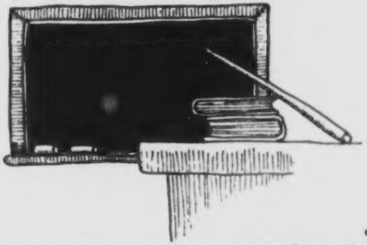
The chairman of the body, former Howard University President James Cheeks, wrote the President that, "Black colleges cannot, nor should not be expected to create the only environment hospitable to Black students."

Dr. Cheek charged that "Universities which took elaborate measures to restrict minority enrollment 25 years ago bear the stigma and depreciated ability to create appropriate educational environment today. Scholarship awards which are influenced by ethnic membership help to improve the chances of the deserving minority student . . ."

JET (January 21, 1991)

Lloyd N. Cutler

A Test for Minority Scholarships



BY MARGARET SCOTT

Late last year the Bush administration wisely repudiated a dubious legal ruling by the Department of Education that would have prevented any college receiving any federal money from administering a scholarship limited to minority recipients. In its haste to limit the political damage, the administration relied on a legal theory that is even more dubious. Fortunately, Secretary of Education-designate Lamar Alexander has now informed his confirmation hearing that he intends to rethink the entire problem.

The legality of scholarships limited to minorities has been a sleeping dog for many years. It was awakened when the sponsors of the Fiesta Bowl football game in Phoenix were criticized for holding the game in a state where the voters had recently defeated a ballot proposal for a holiday honoring Martin Luther King Jr. The sponsors offered an additional $100,000 to each college invited to participate in the game—the money to be earmarked for scholarships limited to minority students. The colleges, which receive some federal financial assistance, asked the Department of Education whether they could accept the funds. The department, apparently without White House consultation, ruled that administration of these restricted scholarships by a college receiving any federal aid would violate the anti-discrimination provisions of Title VI of the Civil Rights Act, as amended by the Civil Rights Restoration Act of 1988.

There is a real irony in all this. In its 1987 *Grove City* decision, the Supreme Court had construed Title VI to cover only those college or university programs and activities that receive federal aid, and not those programs and activities that the college or university funds without federal aid. In the 1988 amendment, however, Congress, over a presidential veto, effectively reversed the *Grove City* decision by specifying that Title VI applied to *all* the operations of any college or university that received federal funds for *any* of its programs or activities, an amendment obviously designed to help minorities rather than harm them.

When the department interpreted the amendment to bar colleges from administering funds restricted to helping minorities, the White House immediately recognized that this surprise ruling went well beyond the administration's well-known stand against quotas. So it made the department reverse itself and issue a new ruling that while a college or university receiving federal aid may not use its "own" funds (whatever they may be) to award scholarships limited to minorities, it may accept gifts of funds from outside private sources on condition they be used for such scholarships. But under the 1988 amendment, if a college receives any federal funds, it cannot conduct any "operation" that discriminates in admissions or benefits. It seems plain that "operation" covers the administering of minority scholarships, even when the college receives the funds from somebody else.

The flaw in the department's original ruling was not that the funds came to the college from someone else, but that it focused on the terms of a single gift to each college, not on the entire scholarship program of that college. Most institutions maintain a broad spectrum of student aid with a wide menu of loans, grants and work opportunities. This menu usually includes a variety of programs with particular rules and conditions established by the institution or the donor of the funds, based on such factors as the applicant's other earnings or sources of aid, the income of the applicant's family, the applicant's field of study, alumni relationship, gender, marital status, religion or even race, color or national origin.

Within such broad programs of financial aid, the fact that some scholarships are limited to minorities should not automatically make them discriminatory against other students. The test of a minority scholarship program should be whether other needy, nonminority students have a reasonable prospect of receiving financial aid from other programs administered by the college. At any institution where minority scholarships are a minor fraction of all the aid available, and where most needy students do in fact receive aid under one or more of the many programs the institution maintains, there may be no undue discrimination in benefits based on race, color, national origin or other forbidden grounds.

In the *Bakke* case, the Supreme Court through Justice Powell held that consideration of race as one factor in admission to a state university is constitutionally permissible, while rigid quotas are not. Just last term, the court upheld a Federal Communications Commission policy, mandated by Congress, that permits a broadcast licensee in regulatory difficulties to avoid a hearing and possible loss of license by selling, at a discount, to a qualified minority applicant (*Metro Broadcasting v FCC*). The court, through Justice Brennan (in his last opinion), said:

"We disagree that the distress sale policy imposes an undue burden on nonminorities. . . . The distress sale policy is not a quota or fixed quantity set-aside. . . . In practice, distress sales have represented a tiny fraction—less than four tenths of one percent—of all broadcast sales since 1979."

Thus the distress sale policy met the constitutional test laid down by the court:

"[W]e similarly find that a congressionally mandated benign race-conscious program that is substantially related to the achievement of an important governmental interests is consistent with equal protection principles so long as it does not impose undue burdens on nonminorities."

The test to be applied to minority scholarships should be similar to the one adopted in *Metro Broadcasting*. A single scholarship fund restricted to minority students should not be held legally discriminatory if the entire student aid program of the college, taken as a whole, does not, in the language of *Metro*, "impose undue burdens on nonminorities" or anyone else. It is a test that some minority scholarships at some institutions may conceivably fail, but that the great majority should readily pass. Just as nonminority firms in *Metro* were "free to compete for the vast remainder of license opportunities," nonminority students are free to compete for the vast remainder of scholarship opportunities that most colleges and universities offer.

The writer, a Washington lawyer, was White House counsel to President Jimmy Carter.

WASH. POST

... SATURDAY, JANUARY 26, 1991 A3

Rights Commission Asks Bush To Back Minority Scholarships

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The U.S. Civil Rights Commission has urged President Bush to support college scholarships reserved for minorities and to clarify government policy on such race-specific grants.

The independent commission Thursday sent Bush its recommendations on the controversial issue in a letter that members approved on a 5 to 2 vote with one abstention. Chairman Arthur A. Fletcher, who last month urged Bush to back such minority scholarships, signed the two-page letter on the commission's behalf.

The action was prompted by a Dec. 18 decision by an Education Department official that such grants are in most cases permissible only if funded by earmarked private gifts. Michael L. Williams, assistant secretary for civil rights, announced that policy two weeks after his total ban on race-specific scholarships provoked a firestorm of criticism.

Williams set a four-year period for compliance, but said his office would continue to investigate discrimination complaints that could lead to sanctions against colleges.

The civil rights commission advised Bush that "this area of vital national concern" should not "be relegated to subcabinet-level pronouncements." The panel said the distinction that Williams made between privately earmarked scholarships and college-funded ones is "legally insupportable" and would outlaw most such scholarships.

"We urge you, therefore, to take a strong stand in support of affirmative action in the recruitment of minority students, including the use of minority-targeted scholarships where necessary to achieve either of two important national interests—remedying the invidious effects of discrimination and attaining the benefits of a diverse student body," the commission wrote.

Voting against the commission's stance were William Allen, a professor from Claremont, Calif., and Carl Anderson, a vice president of the Knights of Columbus. Blandina Ramirez abstained because she works for the American Council on Education, which represents colleges.